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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, et. al.,

Petitioners

v.

JAMES W. KNEPPER, JR., et al.,

Respondents

ON CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Pennsylvania Worker and Community Right-to-Know Act preempted by the Occupational Safety and Health Act of 1970, under the broad "relating to" test expressed by Congress, where the state law regulates the same matters of evaluation and communication of workplace chemical hazards as the federal Hazard Communication Standard, while also purporting to serve other limited purposes?

LIST OF PARTIES BELOW

Manufacturers Association of Tri-County, Appleton Papers Inc., Shenango Incorporated, International Metals Reclamation Company, Inc., Ellwood City Forge Corporation, McDanel Refractory Company, Pennsylvania Foundrymen's Association, Manufacturers Association of Erie, Manufacturers Association of York, Pennsylvania Drycleaners and Launderers Association, American Mushroom Institute, Donsco, Inc., Reading Gray Iron Castings, Inc., Washington Mold Company, Confer, Smith and Company, Inc., Unicast Company and the Hospital Association of Pennsylvania were plaintiffs in the proceedings below and are Petitioners herein. James W. Knepper, Jr., Secretary of the Department of Labor and Industry, Herbert Thieme, Deputy Secretary for Administration of the Department of Labor and Industry, the Pennsylvania Department of Labor and Industry, and the Commonwealth of Pennsylvania were defendants below. Pennsylvania American Federation of Labor-Congress of Industrial Organizations, Council 13, American Federation of State, County and Municipal Employees, Pennsylvania Chapter of the Sierra Club, Delaware Valley Council for Clean Air, Philadelphia Area Project on Occupational Safety and Health, United Mine Workers of America, Local 22 of the International Association of Firefighters, International Association of Molders

and Allied Workers, Pennsylvania Public Interest Coalition and the League of Conservation Voters were defendant-intervenors below.[1]

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1. The parent corporation of Appleton Papers Inc. is B.A.T. Industries, p.l.c. The parent corporation of International Metals Reclamation Company, Inc. is Inco, Ltd. There are no other parents, affiliates or subsidiaries of Petitioner corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Manufacturers Association of Tri-County, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on September 12, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 801 F.2d 130 (3d Cir. 1986). The opinion and judgment are set out in Appendix A hereto. The certified judgment in lieu of formal mandate was stayed on November 24, 1986. A copy of the stay order is set out in Appendix B hereto. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 623 F.Supp. 1066 (M.D.Pa. 1985) and is set out in Appendix C hereto.

STATEMENT OF JURISDICTION

The judgment of the Circuit Court was made and entered on September 12, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause, Article 6, clause 2 of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

29 U.S.C. §655 is set out in full in Appendix D hereto.

29 U.S.C. §667 (a) – (c) provides:

(a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under

State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Any State which, at any time, desires to assume responsibiiity for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment –

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

The OSHA Hazard Communication Standard, 29 C.F.R. §§1910.1200 et seq., is set out in full in Appendix E hereto. Section 1910.1200 (a) (2) provides:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.) which deals with state jurisdiction and state plans.

The Pennsylvania Worker and Community Right-to-Know Act, 35 PA. STAT. ANN. §§7301 et seq. (Purdon Supp. 1986) is set out in full in Appendix F hereto.

STATEMENT OF THE CASE

By enacting the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651 et seq. (hereinafter referred to as "the OSH Act"), Congress directed the Occupational Safety and Health Administration of the U.S. Department of Labor (hereinafter referred to as "OSHA") to promulgate uniform, national occupational safety and health standards, 29 U.S.C. §655, and expressly provided that any such federal standard would preempt any state standard relating to the same issue, unless the state standard is approved by OSHA. 29 U.S.C. §667 (b). Pursuant to the OSH Act, OSHA has established a uniform national standard, known as the Hazard Communication Standard, governing the evaluation of, and communication about, hazardous substances in the workplace. 29 C.F.R. §§1910.1200 et seq. Pennsylvania has, by its Worker and Community Right-to-Know Act, 35 PA. STAT. ANN. §§7301 et seq. (Purdon Supp. 1986) (hereinafter referred to as "the Right-to-Know Act"), also sought to regulate the evaluation of, and communication about, workplace hazards. Pennsylvania has not submitted any of the provisions of its state standard for approval by OSHA.

Petitioners include manufacturers subject to the requirements of the OSHA Hazard Communication Standard and the Pennsylvania Right-to-Know Act. They filed suit in the U.S. District Court for the Middle District of Pennsylvania requesting a declaratory judgment that the Right-to-Know Act is preempted and that the Pennsylvania Department of Labor and Industry be permanently enjoined from enforcing the Right-to-Know Act against Petitioners. The district court had jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1337 (a).

The OSHA Hazard Communication Standard

The OSHA Hazard Communication Standard is comprehensive, requiring manufacturers to engage in an expen-

sive multi-stage process of evaluating hazards and informing employees of the risks of exposure to those hazards. The principal requirements of the OSHA Standard are as follows:

(1) Chemical manufacturers and importers must evaluate the hazards of all chemicals produced or imported by them, 29 C.F.R. §1910.1200 (d); and employers must develop a written hazard communication program, which lists the hazardous chemicals in their workplaces and describes the methods the employers will use to inform employees of hazards associated with exposure to those chemicals. 29 C.F.R. §1910.1200 (e).

(2) Chemical manufacturers and importers must prepare a material safety data sheet (MSDS) for each of the hazardous substances covered by the Standard, and must transmit the MSDS to distributors, who make them available to all manufacturing employers. 29 C.F.R. §1910.1200 (g). Each MSDS must include the chemical's name, physical and chemical characteristics, physical hazards and health hazards. 29 C.F.R. §1910.1200 (g) (2) (i)-(iv). For each chemical, the MSDS must also state the primary routes of entry, the OSHA permissible exposure limit, whether it has been listed as an actual or potential carcinogen, any generally applicable precautions for safe handling and use, any generally applicable control measures, and emergency and first-aid procedures. 29 C.F.R. §1910.1200 (g) (2) (v) – (x).

(3) Chemical manufacturers, importers and distributors must label each container of hazardous chemicals located in or leaving their workplaces with both the identities of all hazardous chemicals and appropriate hazard warnings. 29 C.F.R. §1910.1200 (f) (1) – (4).

(4) Employers must provide employees with information and training concerning hazardous chemicals in their work areas. 29 C.F.R. §1910.1200 (h).

The OSHA Standard explicitly preempts any state law pertaining to its subject matter, unless approved as part of a state plan submitted in accordance with Section 18 of the OSH Act. 29 C.F.R. §1910.1200 (a) (2).

The Pennsylvania Right-to-Know Act

On November 5, 1984, Pennsylvania enacted the Right-to-Know Act. Like the OSHA Standard, the Right-to-Know Act focuses upon the identification of hazardous chemicals in the workplace and the communication of information about those chemicals to employees by means of MSDS, container labeling and employee information and training programs. The principal requirements of the Right-to-Know Act are as follows:

(1) Employers must survey their workplaces for the presence of substances found on a list of hazardous substances prepared by the Pennsylvania Department of Labor and Industry. The results of the survey must be posted in the workplace and reported on forms supplied by the Department. The employers must also designate on the form any workplace hazardous substance that qualifies as either a "special hazardous substance"[2] or an "environmental hazard."[3] 35 PA. STAT. ANN. §§7303 (a) – (e), 7307 (Purdon Supp. 1986). A separate environmental hazard survey form must be completed if requested by the Department. 35 PA.

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2. Defined as posing a special hazard to health and safety. 35 PA. STAT. ANN. §7302 (Purdon Supp. 1986).

3. Defined as posing a danger if released into the environment. 35 PA. STAT. ANN. §7302 (Purdon Supp. 1986).

STAT. ANN. §7303 (g) (Purdon Supp. 1986).

(2) Manufacturers, importers and suppliers of hazardous substances must prepare an MSDS for each hazardous substance, and must transmit them to their customers. Employers must obtain an MSDS for each hazardous substance used in the workplace. 35 PA. STAT. ANN. §7304 (b) (Purdon Supp. 1986). In addition to the information required by the OSHA Hazard Communication Standard, each MSDS must include the Chemical Abstracts Service number and all chemicals comprising 3% or more of the substance, whether hazardous or not, as well as all hazardous substances comprising 1% or more of the substance, and all special hazardous substances comprising .01% or more of the substance. 35 PA. STAT. ANN. §7304 (c) (Purdon Supp. 1986).

(3) Suppliers must insure that all containers of chemicals produced in, or delivered to, Pennsylvania are labeled. 35 PA. STAT. ANN. §7304 (a) (Purdon Supp. 1986). Employers must insure that all containers of hazardous substances in the workplace are labeled with both the identities of all hazardous chemicals (including all hazardous substances constituting 1% or more and all special hazardous substances constituting .01% or more of a mixture) and appropriate hazard warnings. 35 PA. STAT. ANN. §7306 (a) (Purdon Supp. 1986). Employers must also label the ports of any pipeline system to identify the contents. 35 PA. STAT. ANN. §7306 (c), (d) (Purdon Supp. 1986).

(4) Employers must provide employees with information and training concerning hazardous chemicals in their work area. 35 PA. STAT. ANN. §§7303 (e), 7305 (c) – (e), 7306 (d), 7307, 7308 (Purdon Supp. 1986). Information concerning hazardous sub-

stances in the workplace must also be provided upon request to citizens and police, fire and emergency response agencies. 35 PA. STAT. ANN. §§7303 (e), (f) (Purdon Supp. 1986).

The Rulings Below

The district court and the court of appeals disagreed on whether the most crucial provisions of the Right-to-Know Act were preempted by the OSHA Standard, and were in accord on relatively few points, even though both claimed to be following the same test and precedent. The principal holdings below were as follows:

(1) Hazardous Substance Surveys. The district court held that the hazardous substance survey provisions were generally preempted in the manufacturing sector, with the exception of those requirements relating to hazards designated as environmental hazards. 623 F.Supp. at 1072-73. The court of appeals, in contrast, upheld all of these survey requirements, with the sole exception of the workplace posting provision. 801 F.2d at 137-138.

(2) MSDS. The district court held that the MSDS requirements were preempted as to all workplace hazards not designated as environmental hazards, except when the substance is delivered to non-manufacturing employers. 623 F.Supp. at 1074. The court of appeals upheld virtually all the MSDS requirements, excepting only the manufacturing employer's obligation to make the contents of the MSDS known to his employees. 801 F.2d at 140-141.

(3) Labeling. The district court held that the container labeling requirements were preempted, except when the container is delivered to non-

manufacturing employers. 623 F.Supp. at 1073-74. The court of appeals upheld all labeling requirements, with the exception of workplace labeling of hazards not designated as environmental hazards. 801 F.2d at 138-140.

(4) Employee Training. The district court held that the employee training provisions were preempted in the manufacturing sector. 623 F.Supp. at 1074. The court of appeals agreed as to workplace hazard training, but suggested that the state might retain such a requirement for environmental hazards. 801 F.2d at 142.

The effect of the court of appeals' decision is to place additional burdens on manufacturers and employers, particularly with respect to labeling and MSDS. For example, the provisions of the Pennsylvania law upheld by the court of appeals require labels and MSDS to include not only hazardous chemicals, but all chemical ingredients whether hazardous or not.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals Has Decided an Important Question of Federal Law In a Manner Inconsistent With Applicable Decisions of This Court, Thereby Destroying the Uniformity of Nationwide Regulation of Workplace Hazard Communication as Intended by Congress and OSHA, and Threatening Federal Supremacy.

The extent to which state right-to-know laws are preempted by the OSH Act and the Hazard Communication Standard is an increasingly important question of federal law, requiring a consistent Supremacy Clause analysis faithful to Congressional intent. Here, the court of appeals has disregarded the broad statutory preemption language, as well as the OSH Act's carefully balanced preemption scheme and OSHA's expressed purpose to replace the chaos of state right-to-know regulation with a uniform federal standard. The court of appeals' decision will encourage state and local governments to circumvent the OSH Act's requirements for approval of any state regulation, and lead to proliferation of parallel and duplicative state regulatory schemes. Many states and other local governmental authorities already have been persuaded to pass their own right-to-know laws without seeking federal approval.[4] Courts of appeals have had to address the extent of the preemptive effect of the OSH Act and the Hazard Communication Standard on state right-to-know laws three times within the past year.[5] This court now has the opportunity to clarify the law in this important area, and to give effect to the intent of Congress by preserv-

4. At least 17 states without OSHA approved plans have some version of a right-to-know law. Thompson Pub. Group, RIGHT-TO-KNOW NEWS at 4 (Special Issue, Oct. 1, 1986). By comparison, 23 jurisdictions have received state plan approval. See 29 C.F.R. Part 1952.

5. In addition to the case below, the cases addressing preemption of right-to-know laws are New Jersey Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985) and Ohio Manufacturers' Association v. Akron, 801 F.2d 824 (6th Cir. 1986).

ing the uniformity of hazard communication regulation in the workplace.

Congress and OSHA Have Clearly Expressed Their Intent That the Hazard Communication Standard Have a Broad Preemptive Effect

A state statute is expressly preempted when Congress has stated its intent to preempt the field. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Where preemption is express, no conflict between federal law and state law is necessary to invalidate the state provision. City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973).

Established preemption doctrine therefore stresses the significance of Congressional intent. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982). Indeed, Congress' intent is to be the "ultimate touchstone" in preemption cases. Retail Clerks Int. Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963).

Congress made clear in the OSH Act its intent to preempt state occupational safety and health laws. To ensure uniformity, Congress first authorized OSHA to set national standards. 29 U.S.C. §655. Then, in Section 18 of the OSH Act, Congress expressly provided for preemption of state laws relating to issues with respect to which a federal standard has been promulgated. 29 U.S.C. §667 (b). Congress explicitly defined the extent to which it intended to preempt state law. Section 18 (a) authorizes the states to regulate in any occupational safety and health area where "no standard is in effect." 29 U.S.C. §667 (a). When OSHA has issued a standard, Section 18 (b) requires any state that wants to regulate in the area covered by the standard to submit a plan to OSHA for approval. 29 U.S.C. §667 (b).

Significantly Congress did not simply give the states concurrent jurisdiction over occupational safety and health. The OSH Act was adopted in 1970 because "State regula-

tion [had not] proven sufficient to the need" and because "[t]he spread of industry and the mobility of the workplace combined to make the health and safety of the worker truly a national concern." S.Rep. No. 1281, 91st Cong. 2d Sess. 4, reprinted in 1970 U.S. Code Cong. and Ad. News 5180. The strong Congressional policy to avoid duplicative regulation is found throughout the OSH Act. It is especially evident in the provision addressing situations where, as here, the state standard is "applicable to products which are distributed or used in interstate commerce." To be approved by OSHA such a state standard must not only be at least equally effective as the federal standard; it must also be "required by compelling local conditions and . . . not unduly burden interstate commerce." 29 U.S.C. §667 (c)(2). The assessment of these factors is to be made by OSHA, and not by individual state legislatures. Section 18 is clearly mandatory. Any state that wishes to implement a law relating to an issue for which there is an OSHA standard must do so by submitting it to OSHA for approval.

Likewise, the OSHA Hazard Communication Standard explicitly preempts any state law pertaining to the same subject unless approved as part of a state plan. 29 C.F.R. §1910.1200 (a)(2). Such a federal regulation preempting state law is entitled to judicial deference when it represents a "reasonable accommodation" by an administrative agency of matters committed to its care and it does not actually conflict with the intent of Congress. Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982); Capitol Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984). As explained in the preamble accompanying publication of the Standard, preemption was necessary because of the "recent proliferation of state and local right-to-know laws" and "the regulatory burden" they imposed.[6] 48 Fed.

6. At the time the Standard was issued, twelve states and six local governments had some type of regulation related to hazard communication, while thirteen other states and three other local governments had legislation pending. 48 Fed. Reg. 53282 - 84 (1983).

Reg. 53283 – 84 (1983). OSHA also cited the "strong policy justification for uniform application throughout the distribution system of a national" standard. OSHA found that a single federal standard would serve to enhance employee protection as well as reduce the burden on interstate commerce posed by multiple laws. 48 Fed. Reg. 53334 (1983).

The specific statutory preemption test enacted by Congress in the OSH Act has been given a broad construction by this Court in interpreting other statutes. Congress provided, in Section 18 (b) of the OSH Act, that any state law "relating to"[7] an occupational safety and health issue for which a federal standard was in effect would be preempted, unless approved by OSHA. 29 U.S.C. §667 (b). Thus, state laws "relating to" the issue covered by the Hazard Communication Standard are preempted. United Steelworkers of America v. Auchter, 763 F.2d 728, 736 (3d Cir. 1985). Although this Court has not previously addressed the meaning of "relating to" in the context of the OSH Act, when deciding another express preemption case it made clear that state regulation "relating to" the forbidden subject is preempted no matter what the purpose of the state law.

> Whatever the purpose or purposes of the New Jersey statute, we conclude that it 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating benefits—integration—that is permitted by federal law.

Alessi v. Raybestos – Manhattan, Inc., 451 U.S. 504, 524 (1981). Ironically, the Third Circuit decision affirmed by this Court in Alessi, had also held that the "relating to" language in the statute before it should be given a broad meaning in "its normal dictionary sense." Buczynski v. General Motors Corp., 616 F.2d 1238, 1250 (3d Cir. 1980). Two years

7. The Hazard Communication Standard and the courts below used the term "pertaining to", while the OSH Act uses the term "relating to" when expressing the extent of preemption. The terms appear to be synonymous.

later, in a unanimous opinion written by Justice Blackmun, this Court found that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 436 U.S. 85, 96–97, (1983). There is no reason to believe that Congress intended the "relating to" phrase in the OSH Act to have anything other than the same "plain" meaning recognized in Shaw. Id. at 97. Thus to follow this Court's decision, the court of appeals should have examined the Right-to-Know Act to determine whether it related to, had a connection with or reference to, the issue of the evaluation and communication of occupational hazards.

The Court of Appeals Ignored This Broad Preemptive Intent and Applied an "Any Other Purpose" Test That Is Contrary to Established Principles of Preemption Analysis and That Allows Federal Preemption to Be Easily Circumvented

Even a cursory review of the court of appeals' opinion reveals its sharp divergence from the established preemption principles discussed above. One looks in vain for any reference to the Congressional purpose or OSHA's intent. Instead, the court of appeals has concocted a novel preemption test that allows it to seize upon any excuse to uphold the requirements of the Right-to-Know Act. The court of appeals' analysis places it squarely outside this Court's standards, and flouts the expressed intent of Congress and OSHA. Rather than promoting unformity and adherence to the scheme established by Congress for OSHA review of state plans, the court actually discourages such compliance by allowing easy evasion.

While the court made passing reference to the statutory test it should have applied, it thereafter completely abandoned this line of reasoning, making no further mention of how or whether any part of the Pennsylvania law pertains or relates to issues addressed in the OSHA Standard. Instead, the court of appeals purportedly based its decision

upon an analysis of the "primary purpose" of individual sections of the Pennsylvania law. This analysis is more apparent than real, however, since the opinion reveals that the Court upheld virtually any provision of the Pennsylvania law for which it could perceive any purpose other than hazard communication to employees. Far from requiring the state to establish the validity of its primary purpose, the court merely assumed that the presence of any other purpose insured that the primary purpose of any given requirement was not hazard communication to employees.

The consequences of the court of appeals' analysis are evident in its handling of the hazardous substance survey requirements. The court upheld survey requirements in part because of the "broad range of hazards . . . illustrated by the comprehensiveness of the Pennsylvania hazardous substance list." 801 F.2d at 137. But all of the hazardous substances—apart from those also deemed environmental hazards should they escape from the workplace—are solely workplace hazards. Many, if not all, would also be deemed workplace hazards under the OSHA Standard.[8] Nor is the remainder of the court's reasoning on this issue any sounder. The court defends the hazardous substance surveys on the extraordinary ground that without them employers could not meet their obligation to send a survey to any interested member of the public. 801 F.2d at 138. Surely, possible public curiosity—where employees and their representatives are

8. The court of appeals appears to have mistakenly assumed that only the toxic and hazardous substances described in "OSHA's list" in 29 C.F.R. Part 1910, Subpart Z, and specifically incorporated into the Right-to-Know Act, 35 PA. STAT. ANN. §7303(a)(5) (Purdon Supp. 1986), are regulated under the OSHA Standard, when it stated that the Pennsylvania hazardous substance list "includes many other substances as well." 801 F.2d at 138. In fact, the OSHA Standard applies to any "health hazard" or "physical hazard". 29 C.F.R. §1910.1200(c). The Subpart Z list is only one of the sources upon which a manufacturer must rely in determining whether chemicals are hazardous under the Standard. 29 C.F.R. §1910.1200(d)(3).

most likely to be the interested parties--is no basis for a duplicative scheme of workplace hazard regulation. If no more is needed than this, little if anything will remain of Section 18.

The court then proceeded with an exercise in blatant bootstrapping. It upheld the labeling provisions on the ground that labeling will help employers comply with the hazard survey requirements of the Pennsylvania law.[9] 801 F.2d at 139. From this the court concluded that "it cannot be said that the primary purpose of the supplier's labeling requirement . . . is hazard communication to employees." Id. Although the labeling requirements of the Pennsylvania law were clearly related to hazard communication to employees, the possibility of some additional use for labels was deemed sufficient to validate them.

Similarly, the court of appeals analyzed the MSDS provisions in the Pennsylvania law as follows:

> The MSDS serve purposes other than hazard communication to workers. They can facilitate the preparation of hazardous substance surveys, which will be useful to public safety officials, and environmental hazard surveys, which will be useful to agencies concerned with emissions and discharges. Since we cannot say that the preparation of and distribution of MSDS has as its primary purpose the communication of hazards to employees, that requirement is not expressly preempted by the OSH Act, even in the manufacturing sector.

801 F.2d at 141. That the state required documents can conceivably be "useful" to someone other than employees, was enough for the court to find that their "primary purpose" could not be hazard communication to employees. Such analysis completely thwarts Congress' purpose and OSHA's intent.

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9. Petitioners know of nothing in the record to support this finding.

The attitude exhibited by the Third Circuit contrasts sharply with the deference shown by the Sixth Circuit to OSHA's regulatory intent concerning preemption of local right-to-know laws. In Ohio Manufacturers' Association v. Akron, 801 F.2d 824 (6th Cir. 1986), the Sixth Circuit held local right-to-know laws to be preempted to the same extent as state laws, recognizing that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Id. at 833. Accord, Blum v. Bacon, 457 U.S. 132, 141 (1982). The Third Circuit below did not even mention OSHA's intent.

The failure of the court of appeals' preemption analysis is clear from its consequences. If "any other purpose" is to be the test, a state legislature will always be able to devise a rationale for a statute to escape preemption. Instead of using Congressional intent as its touchstone, the court of appeals has provided the states with a wide avenue to circumvent the statutory scheme. Nor is there any reason to hope that the mischief will be restricted to the area of occupational safety and health. If a state is free to disregard Congress' desire for uniformity when expressed in the language of the OSH Act, it would also be free to do so when Congress expressed that desire in different language. As this Court stated when discussing a purpose test in another context, it will

> enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

Perez v. Campbell, 402 U.S. 637, 652 (1971).

The confusion that can arise from the Third Circuit's approach to preemption is illustrated by a comparison to its decision on the validity of the New Jersey Worker and Com-

munity Right to Know Act.[10] New Jersey Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985). The New Jersey Act, like the Pennsylvania statute, required employers to complete workplace hazard surveys and distribute them, not only to employees, but also to the state regulatory agency and to local fire and police departments. Yet the Third Circuit held that the New Jersey workplace hazard survey requirements were preempted in the manufacturing sector, because their "primary purpose" was promotion of occupational safety and health. Id. at 595. In spite of the finding by the district court below that the Pennsylvania and New Jersey survey provisions were "substantially identical",[11] the court of appeals found the Pennsylvania provisions valid. A test so nebulous that it leads to opposite rulings concerning virtually indistinguishable statutes cannot be allowed to remain the law.

Furthermore, a decision by this Court reaffirming the broad preemptive purpose expressed in the OSH Act and the OSHA Standard will make it substantially less likely that the issue of implied preemption,[12] with its painstaking

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10. N.J. STAT. ANN. §§39.5A-1 et. seq. (West Supp. 1986).

11. 623 F.Supp. at 1072.

12. Although only express preemption was argued to the district court and the court of appeals below, the Third Circuit addressed and rejected the possibility of implied preemption with respect to the surveys, labeling and MSDS requirements of the Right-to-Know Act. The court could not properly carry out such an inquiry on the record before it, and any analysis of implied preemption in this case would require a remand to the district court for an evidentiary hearing to determine whether a conflict between the federal and state statutory requirements exists.

While this Court will not be required to decide the implied preemption issues, should this Petition be granted, it will be necessary, as a result of the court of appeals' action, to take jurisdiction over those issues in order for effective relief to be granted. Should any of the challenged requirements of the Right-to-Know Act be found not expressly preempted, a remand to the district court to resolve the remaining implied preemption issues would be appropriate.

section-by-section search for conflicts, will have to be litigated in every jurisdiction that has adopted a right-to-know law. The savings in time and resources for litigants and the judiciary will be enormous.

CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

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Dated: December 10, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 86-5032 and 86-5066

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, APPELTON PAPERS, INC., SHENANGO INCORPORATED, INTERNATIONAL METALS RECLAMATION COMPANY, INC., ELLWOOD CITY FORGE CORPORATION, AND McDANEL REFRACTORY COMPANY,

Appellants in No. 86-5066

vs.

JAMES W. KNEPPER, JR., Secretary of the Department of Labor and Industry, THE PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, and the COMMONWEALTH OF PENNSYLVANIA

(D.C. Civil No. 85-1027)

PENNSYLVANIA FOUNDRYMEN'S ASSOCIATION, MANUFACTURERS ASSOCIATION OF ERIE, MANUFACTURERS ASSOCIATION OF YORK, PENNSYLVANIA DRYCLEANERS AND LAUNDERERS ASSOCIATION, AMERICAN MUSHROOM INSTITUTE, DONSCO, INC., READING GRAY IRON CASTINGS, INC., WASHINGTON MOLD COMPANY, CONFER, SMITH AND COMPANY, INC., UNICAST COMPANY, and THE HOSPITAL ASSOCIATION OF PENNSYLVANIA,

Appellants in No. 86-5066

vs.

JAMES W. KNEPPER, JR., individually and in his official capacity as Secretary of Labor and Industry for the Commonwealth of Pennsylvania, HERBERT THIEME, individually and in his official capacity as Deputy Secretary and Administration of the Department of Labor and Industry Pennsylvania American Federation of Labor-Congress of Industrial Organizations, Council 13, American Federation of State County and Municipal Employees, Pennsylvania Chapter of the Sierra Club, Delaware Valley Council for Clean Air, Philadelphia Area Project on Occupational Safety and Health, United Mine Workers of America, Local 22 of the International Association of Fire Fighters, International Association of Molders and Allied Workers, Pennsylvania Public Interest Coalition and League of Conservation Voters, Intervenors, Appellants in No. 86-5032

(D.C. Civil No. 85-1028)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA - SCRANTON
(D.C. Civil Nos. 85-1027 and 85-1028)

Argued: July 21, 1986
Before: GIBBONS, WEIS, and SLOVITER, *Circuit Judges*
(Opinion filed September 12, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

This is an appeal from a final summary judgment in consolidated actions challenging the constitutionality of the Pennsylvania Worker and Community Right-to-Know Act (the Act), 35 Pa. Stat. Ann. tit. 35, §§ 7301-7320 (Purdon Supp. 1986), and seeking injunctive relief against its enforcement. The plaintiffs[1] contend that the Act is preempted by the federal Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982) (OSH Act) and the Occupational Safety and Health Administration's (OSHA) Hazard Communication Standard, 29 C.F.R. § 1910.1200 (1985). The plaintiffs also argue that the Pennsylvania Act violates the commerce clause and exacts a taking of property for public use without just compensation. The defendants[2] are state officials and a state department charged with the enforcement of the

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1. The plaintiffs include the following: Manufacturers Association of Tri-County, Appleton Papers, Inc., Shenango Incorporated, International Metals Reclamation Company, Inc., Ellwood City Forge Corporation, McDanel Refractory Company, Pennsylvania Foundrymen's Association, Manufacturers Association of Erie, Manufacturers Association of York, Pennsylvania Drycleaners and Launderers Association, American Mushroom Institute, Donsco, Inc., Reading Gray Iron Castings, Inc., Washington Mold Company, Confer, Smith and Company, Inc., Unicast Company, and the Hospital Association of Pennsylvania.

2. The defendants are James W. Knepper, Jr., Secretary of the Department of Labor and Industry, Herbert Thieme, Deputy Secretary for Administration of the Department of Labor and Industry, the Pennsylvania Department of Labor and Industry, and the Commonwealth of Pennsylvania.

Act. Certain labor unions and environmental groups were permitted to intervene[3] for the purpose of defending the constitutionality of the Act. All parties moved for summary judgment. The district court, relying extensively on this court's opinion in *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), which dealt with the New Jersey Worker and Community Right-to-Know Act (New Jersey Right-to-Know Act), rejected most of the plaintiffs' challenges to the constitutionality of the Act.[4] The court held, however, that subsections 7303(e), (f), (i), and (j), subsections 7305(a), (c) and (g), and subsections 7307(a) and (b) were expressly preempted in the manufacturing sector[5] by the OSH Act to the extent they pertain to hazardous substance survey forms. *Id.* at 1072. Moreover, the district court also held that sections 7304(a) and 7306 of the Act, requiring labeling of containers of hazardous substances, were expressly preempted to the extent that these sections require manufacturing employers to label containers used in their place of business and

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3. The intervenors include the following:

Pennsylvania American Federation of Labor-Congress of Industrial Organizations, Council 13, American Federation of State, County, and Municipal Employees, Pennsylvania Chapter of the Sierra Club, Delaware Valley Council for Clean Air, Philadelphia Area Project on Occupational Safety and Health, United Mine Workers of America, Local 22 of the International Association of Firefighters, International Association of Molders and Allied Workers, Pennsylvania Public Interest Coalition, and the League of Conservation Voters.

4. The district court opinion is reported. *See* Manufacturers Ass'n of Tri-County v. Knepper, 623 F. Supp. 1066 (M.D. Pa. 1985).

5. See United Steelworkers of America v. Auchter, 763 F.2d 728, 738 (3d Cir. 1985) (duly promulgated OSH Act standard, which governs employees in the manufacturing sector , expressly preempts state law in that sector).

to the extent that they require suppliers to label containers shipped to employers or customers in the manufacturing sector. *Id.* at 1073. Additionally, the court held that section 7308, which requires employers to provide an education and training program for employees, was expressly preempted in the manufacturing sector, and that subsection 7310(a), which requires the Pennsylvania Department of Labor and Industry (the Department) to conduct outreach programs to educate employees and the public, was expressly preempted insofar as it pertains to the disclosure of workplace hazards[6] to employees in the manufacturing sector. *Id.* at 1074. Similarly, the court held that subsection 7310(d), permitting employers to furnish Hazardous Substance Fact Sheets to employees, was preempted in the manufacturing sector. *Id.* at 1075. Finally, the court held that subsections 7304(b), (c), (d), (e), (f), and (g), requiring manufacturers, importers, and suppliers to furnish Material Data Safety Sheets (MSDS) with shipments were expressly preempted insofar as they require that MSDS be furnished for shipments of hazards-workplace substances destined for manufacturing-sector customers.

The plaintiffs and the intervenors appeal. The defendants filed a notice of appeal, but did not pursue it. As appellees, the defendants defend the district court's decision to the extent that it upholds the constitutionality of the Act. The intervenors contend that the district court erred in holding the hazard survey requirement, the labeling requirement, the MSDS requirement, and the education and training requirement preempted in the manufacturing sector.

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6. The district court coined the term "workplace hazard", and defined it as "a substance found on the Hazardous Substance list but not found on the environmental substance list." 623 F. Supp. at 1074 n.7.

The plaintiffs defend the district court's preemption rulings to the extent the court found preemption. They contend, however, that the court erred in finding the labeling and MSDS requirements preempted only to the extent they apply to users of hazardous substances in the manufacturing sector; the plaintiffs argue that preemption should be broader. They also contend that, once the district court held that the Act was preempted in the manufacturing sector, *see* 623 F. Supp. at 1075, the court should have held the Act entirely invalid because as a matter of Pennsylvania law the preempted provisions of the Act were not severable. Some plaintiffs also contend that the district court erred in granting summary judgment dismissals of their commerce clause and taking contentions because there were genuine issues of material fact as to those contentions.

We hold that the district court properly applied the Pennsylvania law of severability, and correctly ruled that there was no OSH Act preemption outside the manufacturing sector, that the education and training requirement was preempted as to employees in the manufacturing sector, and that the Department Outreach program was preempted in that sector. We also hold that the district court erred in holding the hazard survey, labeling, and MSDS requirements totally preempted in the manufacturing sector. Finally, we conclude that the court properly granted summary judgment on the commerce clause and taking clause contentions. Thus we affirm in part and reverse in part.

I.

Preemption

The Pennsylvania Act is substantially similar although not identical to the New Jersey Worker and Community Right to Know Act, N.J. Stat. Ann.

§§ 34:5A-1 to 31 (West Supp. 1986), which we addressed in *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985). Thus that decision is generally controlling. In *Hughey* we held that a state right-to-know act, requiring the collection and dissemination of information with respect to hazardous substances was expressly preempted only to the extent that the state act pertains to issues that are addressed by a duly promulgated OSHA standard. *Id.* at 592. We held, further, that a state right-to-know act was impliedly preempted only to the extent that it is impossible to comply with both the state law and the federal standard, or to the extent that the state law serves as an obstacle to the accomplishment of the congressional purposes served by the OSHA standard. *Id.* at 594. Finally, we held that the severability of a state law that was partially preempted was determined by the law of that state. *Id.* at 596. With these general principles in mind, we turn to the parties' contentions.

A.

Severability

The plaintiffs' severability contentions need not detain us long. The Act contains an express severability clause:

> The provisions of this act are severable. If any provision of this act or its application to any person or circumstances [is] held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application.

Pa. Stat. Ann. tit. 35, § 7320. This broad language leaves no room for speculation as to the intention of the Pennsylvania legislature with respect to severability. Indeed the language of section 7320 is reinforced in subsection 7319(b). *See id.* § 7319. Subsection (b) of

this section discloses that the Pennsylvania legislature was fully aware of the possible preemptive effects of federal legislation, for it provides:

> *Construction with Federal law.* —
>
> This act is to be read in conjunction with any provision of Federal law providing for the identification, labeling or providing of information concerning hazardous substances and is intended to supplement such Federal regulation in the interests of protecting the health and safety of citizens of the Commonwealth.

Id. § 7319(b). Thus the subsection suggests that the legislature intended the Act to be operative to the extent that federal law permits, and that intention is expressly stated in section 7320.

Despite the clear language of section 7320 and subsection 7319(b), however, the plaintiffs urge that those provisions should be disregarded in light of subsection 7319(d). Subsection 7319(d) reads:

> *Review of preemption.* —
>
> Should Federal Government preemption be finally adjudicated and result in lessening the burden on any employer to meet the requirements of this act, it is the intent that the General Assembly reexamine this act so that all employers hereunder shall be reexamined as to requirements necessary in meeting the standards of this act so as to treat all employers fairly and equitably.

Id. § 7319(d). The plaintiffs seize on subsection (d) as an expression by the Pennsylvania legislature of the intention that if any employer is exempted from coverage by the preemptive effect of federal law, all

other employers must be preempted as well. The language relied upon cannot be read to convey such a meaning. It is unclear why all employers in the construction or service sectors of the economy would be treated unfairly or inequitably by virtue of an exemption applicable to manufacturing sector employers with which they do not compete. More fundamentally, it is perfectly clear that it is the General Assembly, not the courts, that must reexamine the act to determine if further changes are required in the interest of fairness and equity. The role of the courts is delineated with unmistakable clarity. The Act is to be applied to all persons or circumstances to which it can lawfully be applied. *See id.* § 7320. The legislature's specific direction to that effect in this Act is consistent with its more general direction in the rules of constitutional construction of Pennsylvania's law. Those general rules establish a presumption of severability. *See* 1 Pa. Cons. Stat. Ann. § 1925 (Purdon Supp. 1986).

B.

Hazardous Substance Survey Provisions

As noted above, the district court held that subsection 7303(e) of the Act was preempted in the manufacturing sector by the OSHA standard applicable to employers in that sector. Subsection 7303(e) provides:

> *Hazardous substance survey form.* —
>
> Every employer shall, upon a form supplied by the department, fill out a hazardous substance survey for each workplace, providing information on the hazardous substances present during the prior year. A listing of the hazardous substances shall be posted by the employer as required by section 7[307]. Upon the

> written request of any person in Pennsylvania, the department shall require the employer to forward a copy of the completed survey form to the department within 20 days. The department shall, in turn, keep a copy of the survey form on file, and shall immediately transmit a copy of the form to the original requestor. The employer shall update the hazardous substance survey form for each workplace every two years.

Pa. Stat. Ann. tit. 35, § 7303(e). This subsection appears as part of a general provision that directs the Department to compile and maintain a list of hazardous substances. The Department's list includes all substances found on the latest compilation or issue of eleven designated lists prepared by other governmental and nongovernmental agencies concerned with environmental, health, and safety issues. One of the eleven designated lists is the OSHA list of toxic and hazardous substances found in 29 C.F.R. § 1910.1000-.1500 (Subpart Z). *See* Pa. Cons. Stat. Ann. tit. 35, 7303(a)(5). The Department's list, relying on ten other source lists, is, however, more inclusive than OSHA's list because the Department's lists refer to environmental and general health hazards, not merely to workplace health and safety hazards. Moreover the Department is directed to include "any other substance or mixture designated . . . as hazardous because of its known or probable adverse human or environmental effect." *Id.* § 7303(a). Thus the statutory purpose of the hazardous substance list is broader than workplace safety, which is the sole concern of the OSH Act.

The Act requires that the Department create separate lists of those hazardous substances that shall be considered "special hazardous substances." *Id.* § 7303(d). These substances are designated by the Department as special hazards because their

"particular toxicity, tumorigenicity, mutagenicity, reproductive toxicity, flammability, explosiveness, corrosivity or reactivity poses a special hazard to health and safety." *Id.* § 7302. The Act also requires that the Department designate those hazardous substances that shall be considered "environmental hazards." *Id.* § 7303(d). Environmental hazards are defined as those hazards that "because of [their] particular or extreme properties, pose[ ] a danger if released into the environment." *Id.* § 7302. Thus the Department must prepare three lists: an all-inclusive hazardous substance list, a special hazardous substance list, and an environmental hazardous substance list. All three lists must be transmitted by the Department to every employer subject to the Act. *Id.* § 7303(a), (d).

Subsection 7303(e) requires employers to complete hazardous substance surveys. The survey asks for information on any hazardous substances, as defined by the Department's all inclusive hazardous substance list, that were present in the workplace during the prior year. The surveys necessarily disclose workplace hazards, and these hazards, in the manufacturing sector, include those hazards covered by subpart Z of OSHA's Hazard Communication Standard. The survey also discloses the presence of other hazardous substances that may present environmental or general health hazards, but not workplace hazards.

Under subsection 7303(f) employers must provide emergency health and safety agencies with these surveys and any relevant environmental hazard information. *Id.* § 7303(f). Section 7303(f) states:

> *Access of police, fire and emergency response agencies.* —
>
> Upon the request of a local police, fire or emergency response agency, within whose jurisdiction an employer falls, an employer shall

> provide a copy of its latest hazardous substance survey . . . . The employer shall further provide, upon the request of said agency, all relevant and available information concerning any environmental hazards pertaining to the workplace in question.

Id.

The requirements in the Act that the Department compile hazardous substance, environmental hazard, and special hazard lists and transmit those lists to employers are virtually identical to those in sections 34:5A-4(a) (requiring development of environmental hazardous substance list), 34:5A-5(a) (requiring development of workplace hazardous substance list), 34:5A-5(b) (requiring development of special health hazard list), 34:5A-5(d) (requiring development of workplace hazardous substance fact sheet), and 34:5A-8 (requiring transmittal to employers of hazardous substance fact sheet based on items in employers' workplace survey) of the New Jersey Right-to-Know Act. In *Hughey*, we held that sections 34:5A-4 and 5 were not preempted because the New Jersey Act depends upon an entirely different hazard identification scheme than does the federal hazard disclosure standard. 774 F.2d at 594-95. *See also* C.F.R. § 1910.1200(d),(e)(1)(i). The same is true of the Pennsylvania Act. The Pennsylvania standard relies on the Department to identify hazardous substances whereas the federal standard relies primarily on the original manufacturer or importer. *See* 29 C.F.R. § 1910.1200(d). Therefore the subsections of the Pennsylvania Act, 7303(a) and 7303(d), authorizing the development of the hazardous substance, the environmental hazard, and the special hazard lists are not preempted. While some of the plaintiffs urge that the requirement that the Department transmits these hazardous substance lists to manufacturing-sector

employers should be preempted, the district court held otherwise, *see* 623 F. Supp. at 1071-72 n.5, and that holding is consistent with *Hughey*. *See* 774 F.2d at 595 n.4 (section 34:5A-8, which requires the New Jersey Department of Health to provide employers with a fact sheet for each hazardous substance reported, held not to be preempted).

In *Hughey* this court also considered the requirement in the New Jersey Right-to-Know Act that employers complete hazardous substance surveys. The New Jersey statute provides separately for workplace hazard surveys, N.J. Stat. Ann. § 35:5A-7(a), and environmental hazards surveys, *id.* § 35:5A-7(b). We held that because the primary purpose of the workplace hazard surveys was the promotion of occupational health and safety through hazard communication, section 35:5A-7(a) was preempted in the manufacturing sector by OSHA's Hazard Communication Standard. *See* 774 F.2d at 595. However, because we found that the environmental hazard surveys required by 35:5A-7(b) had a different purpose, we held that the environmental hazard and the related filing and disclosure provisions of the New Jersey Act were not preempted. *Id.*

In the instant case the district court, relying on *Hughey*, held that section 7303(e) of the Pennsylvania Act, which requires employers to complete hazardous substance surveys, was entirely preempted because that provision is virtually identical to section 35:5A-7(a) of the New Jersey Act. *See* 623 F. Supp. at 1072. This holding misreads both the Pennsylvania Act and the *Hughey* opinion. Unlike section 35:5A-7(a), which pertains only to workplace hazards -- the sole concern of the OSHA standard -- section 7303(e) deals with a broad range of hazards, as is illustrated by the comprehensiveness of the Pennsylvania hazardous substance list. Although this

list does include substances found on OSHA's list, it includes many other substances as well. *See* Pa. Stat. Ann. tit. 35, § 7303(a). Moreover substances on the OSHA list may pose hazards not only to workers, but also to the environment and public at large if they escape, and to police, fire, and emergency response personnel called to a place of business. By exempting all manufacturing-sector employers from the requirement that they make hazardous substance surveys, the district court relieved them of the obligation, imposed in subsection 7303(f), that such surveys be made available to public safety agencies and of the requirement that they be made available to interested members of the public through the Department. The more relevant holding in *Hughey* is the conclusion that section 34:5A-7(b) of the New Jersey Act, which requires completion and distribution of environmental hazardous substance surveys, is not preempted. *Hughey*, 774 F.2d at 594 n. 4. Thus the requirements in subsection 7303(e) and 7303(g) that employers make hazardous substance surveys and environmental hazardous surveys, furnish them to the public and employees through the Department on request, *see* Pa. Stat. Ann. tit. 35, § 7305(a) and (c), and the requirement in subsection 7303(f) that employers furnish such surveys to public safety agencies on request are not preempted.

We recognize the substantial similarities between the manner in which the New Jersey and Pennsylvania statutes deal with hazardous substance surveys. We also recognize, however, that the statutes are drawn somewhat differently, and we conclude that the differences are significant. Unlike section 35:5A-5(a) of the New Jersey Act, section 7303(e) of the Pennsylvania Act does not have as its primary purpose the promotion of occupational health and safety through hazard communication. Therefore it is not expressly

preempted in the manufacturing sector by the federal Hazard Communication Standard.

One provision in section 7303(e), however, raises an express preemption question. The requirement that "[a] listing of hazardous substances shall be posted by the employer as required by section 7[307]." Pa. Stat. Ann. tit. 35, § 7303(e). Section 7307 requires that every employer post in every workplace "[l]ists of all hazardous substances and special hazardous substances found in the workplace and all environmental hazards discharged therefrom." *Id.* § 7307. Section 7307 deals only with notification to employees of workplace hazards, and the posting requirement thus is a hazard communication standard. In the manufacturing sector, therefore, it is preempted by the OSHA Hazard Communication Standard. *See Hughey*, 774 F.2d at 595. However, because the Act is severable, and the hazard survey requirement serves purposes other than hazard communication to employees, the hazard survey requirement applies even in the manufacturing sector, while the posting requirement does not.

Our holding that section 7303(e) is expressly preempted by the OSH Act only to the extent that it requires posting by employers of hazardous substance found in the workplace is not dispositive, for although the district court did not address implied preemption, such a holding would afford a separate ground for affirmance. We have examined the summary judgment with this alternative ground in mind, and we conclude that manufacturing-sector employer compliance with both the hazardous substance survey provision and the OSHA Hazardous Substance Communication Standard is possible and that such compliance would not obstruct the accomplishment of the purposes served by the OSHA standard. The plaintiffs' complaints about the burdens imposed by separate

state hazardous substance lists is essentially the same as the complaint that we rejected in *Hughey*. 774 F.2d at 593-94.

C.

Labeling Provisions

Section 7304(a) requires that suppliers of chemicals ensure that every container is labeled in accordance with section 7306. Pa. Stat. Ann. tit. 35. § 7304(a). The latter section specifies what labels are required and imposes on employers a separate obligation to ensure that each container in the workplace is appropriately labeled. *See id.* § 7306. The plaintiffs defend the district court's holding that sections 7304(a) and 7306 were preempted in the manufacturing sector to the extent that they require manufacturing employers to label containers and to the extent they require suppliers to label containers shipped to manufacturing employers. Their defense of the ruling with respect to suppliers is somewhat puzzling because the effect of this ruling is to complicate matters for suppliers who apparently would have to become knowledgeable about the economic sector in which their customers operate and provide separate labels for customers in the manufacturing sector. Pennsylvania's labeling requirements include everything that the OSHA standard mandates. and so far as the summary judgment record discloses. it is possible to include both the OSHA information and the additional Pennsylvania information on the same label. Moreover. as we point out in the discussion of the hazardous substance survey. the Pennsylvania Act addresses broader concerns than workplace safety. The presence of the required labels on all hazardous-substances containers will facilitate employer compliance with their general hazardous substance survey obligations. *see id.* § 7303(e). and

employer compliance with the more specific environmental hazard survey obligations respecting substances emitted, discharged, or disposed from the workplace, *see id.* § 7303(g). Thus it cannot be said that the primary purpose of the supplier's labeling requirement, even with respect to manufacturing sector customers, is hazard communication to employees.

The district court, relying on section 7318(d), construed the supplier labeling requirement to be applicable only when employees are involved. Section 7318(d) exempts employers, for any period of time during which they have no present employees, from certain requirements of the Act.[7] The sections from which such employers are exempted deal primarily with employers' obligations to communicate information to their own employees. We do not read it, as apparently the district court did, to provide an exemption for suppliers selling to customers without employees. The supplier is obliged to label containers of any chemical delivered or produced in Pennsylvania. *Id.* § 7304(a). Obviously delivery to a consumer other than employers is covered. Such a construction of the Act is consistent with its public safety and environmental purposes. In *Hughey* we held that "[t]he Hazard Communication Standard does not expressly preempt section 34:5A-14 to the extent that it requires containers of environmental hazardous

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7. Section 7318(d) provides:

> *Employers without employees.* —
>
> An employer shall not be required to comply with the requirements of sections [7303(e)], [7305(e)], [7306(a)(1) through (5)], [7306(b) through (g)], [7307] and [7308] for any period of time during which the employer does not have any present employees.

Id. § 7318(d).

substances to be labeled." 774 F.2d at 596. That holding, dealing with the New Jersey Act, controls on the issue of express preemption to the extent that an obligation is imposed by the Pennsylvania Act on suppliers to include label information in addition to that required by the federal Hazard Communication Standard. In *Hughey* we also addressed the question of implied preemption. The New Jersey labeling requirement imposed on employers an obligation not only to label containers and preserve labels, but also to label pipelines. Affidavits in the *Hughey* summary judgment record raised material issues of disputed fact as to whether the New Jersey requirement for environmental labeling by employers in the manufacturing sector would lead to confusion of workers, and thereby obstruct the purposes of the federal standard. *See* 774 F.2d 596. The record in this case is different, at least with respect to suppliers. Section 7304(a) does not deal with pipeline labeling. There is no suggestion that suppliers' compliance with Pennsylvania's labeling requirements would confuse manufacturing-sector employees. Thus we hold that section 7304(a) is not impliedly preempted by the federal Hazardous Communication Standard, even with respect to containers supplied to manufacturing-sector employers.

Section 7306, to which section 7304(a) cross-references, specifies the content of the labels. To the extent that section 7306 is thus incorporated in section 7304(a), it binds suppliers. Section 7306 imposes separate obligations, however, on employers, both with respect to containers, *see* Pa. Stat. Ann. tit. 35, § 7306(a), and with respect to pipelines, *see id.* § 7306(c). Like the New Jersey Right-to-Know Act, these employer obligations arguably have a dual purpose of hazard communication to employees and hazard communication to firefighters, police officers,

and members of the community at large. The exemption in section 7318(d) of the Pennsylvania Act from compliance with most of section 7306 for employers not having any present employees, suggests that hazard communication to employees is the chief purpose of the employers' obligations. Moreover section 7318(d) exempts employers, who do not have employees, from the workplace notice requirement in section 7307, which we have held to be expressly preempted by the federal Hazard Communication Standard in the manufacturing sector. Consistent with that holding, we hold that the provisions in section 7306 obliging employers to label containers and pipelines with display labels are preempted for the manufacturing sector.[8]

D.

Material Safety Data Sheets Provisions

Subsection 7304(b) of the Act obliges all suppliers of hazardous substances in Pennsylvania to provide MSDS to all purchasers of such substance with the initial shipment. *Id.* § 7304(b)(1). Employers are also obliged to obtain and maintain MSDS from suppliers. *Id.* § 7304(b)(3). The MSDS must contain the information specified in subsection 7304(c) which is

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8. That holding does not apply to subsection 7306(a)(6) which provides:

> The employer shall ensure that each container of hazardous substance, hazardous mixtures or chemicals leaving the workplace is labeled, tagged or marked with the appropriate information required in paragraphs (1),(2),(3), or (4) [of section 7306(a)]."

The exemption in section 7318(d) does not apply to subsection 7306(a)(6). Thus all manufacturers, even those without employees, must comply with the labeling requirements when they act as suppliers.

more inclusive than the Material Safety Data Sheets required under the federal Hazard Communication Standard. The subsection is qualified, however, by the provision that "[n]otwithstanding the above, any MSDS which contains the information requested in paragraphs (1) and (2), and which otherwise contains the information required by 29 C.F.R. § 1900.1200(g)(2) [sic -- § 1910.1200(g)(2) intended], as of November 25, 1983, shall be considered to have met the requirements of this section." Pa. Stat. Ann. tit. 35, § 7304(c). The reference here is to the provision in the federal Hazard Communication Standard requiring suppliers of chemicals to develop material safety data sheets for each hazardous chemical they supply. Thus compliance with the federal requirement for a material safety data sheet satisfies the Pennsylvania Act, if it also contains:

> (1) The chemical name, the Chemical Abstract Service number, the trade name, common names and any other names under which said substance is regulated by another State or Federal agency.
>
> (2) The chemical name, common name and Chemical Abstract Service number of every chemical contained in the substance which comprises 3% or more of the substance except that hazardous substances shall be listed if they comprise 1% or more of the substance, and all special hazardous substance which comprise 0.01% or more of the substance shall be listed.

Id. The federal Hazard Communication Standard already requires the disclosure of chemical and common names. *See* 29 C.F.R. § 1910.1200(g)(2)(i)(B), (C)(1), and (C)(2). Thus the only substantive difference between the Pennsylvania and federal requirements

appears to be Pennsylvania's requirement that chemical abstract service numbers be included.

The district court, apparently relying on the fact that separate hazardous substance and environmental hazards lists are required by section 7303(d), defined workplace hazards as substances found on a department hazardous substance list but not on the environmental hazards list. 623 F. Supp. at 1074 n.7. The court held that MSDS must be supplied, even to manufacturing sector purchasers, if they included information on environmental hazards, but not if the substances in question would present only workplace hazards. Thus interpreted, the court held that the requirement that MSDS be supplied to manufacturing-sector purchasers was expressly preempted by the OSH Act. 623 F. Supp. at 1074. Consequently, as in the case of labeling requirements, the court's holding requires suppliers to prepare several different kinds of MSDS, depending on whether the substance is both a workplace and an environmental hazard and whether the customer is an employer in the manufacturing sector. The district court's holding with respect to MSDS, insofar as it applies to the obligation of suppliers to develop and supply such sheets, suffers from the same defects as does the holding with respect to labeling. The MSDS serve purposes other than hazard communication to workers. They can facilitate the preparation of hazardous substance surveys, which will be useful to public safety officials, and environmental hazard surveys, which will be useful to agencies concerned with emissions and discharges. Since we cannot say that the preparation of and distribution of MSDS has as its primary purpose the communication of hazards to employees, that requirement is not expressly preempted by the OSH Act, even in the manufacturing sector. As to implied preemption, any danger that the

Pennsylvania Act makes compliance with the federal act impossible or that the Pennsylvania Act would serve as an obstacle to the accomplishment of the OSH Act's objectives is obviated by the provision in section 7304(e) making compliance with the federal Hazard Communication Standard requirement and the Pennsylvania requirement virtually coextensive. There is no suggestion in the record that the addition of chemical abstract service numbers would confuse employees in the manufacturing sector. Thus we hold that all suppliers covered by the Act must furnish MSDS required by section 7304, even to customers in the manufacturing sector. Moreover, since those sheets serve purposes other than hazard communication, the obligation of employers to obtain and maintain such sheets, *see id.* § 7304(b)(3), is not preempted. Likewise the provision in section 7303(f), requiring employers to make copies of MSDS available to local police, fire, or emergency response agencies is not preempted. The requirements in section 7303(j) that the Department retain at least one MSDS for each hazardous substance, and the requirement in section 7305(a) that the Department make MSDS available to local public safety agencies, are also not preempted.

Employers' obligations with respect to MSDS present different considerations. Subsection 7305(c), (d) and (e), and subsection 7307(b) deal with hazard communication to employees of the contents of MSDS and of Hazard Safety Factor Sheets prepared by the Department. These communication provisions fall directly within the subject matter of the federal Hazard Communication Standard, and under *Hughey* they must be held to be expressly preempted in the manufacturing sector. The provisions appear to have no other purpose than the promotion of occupational health and safety through hazard communication. To the extent that workers in that sector are also

interested in environmental and public health and safety issues outside the workplace, that interest is recognized elsewhere in the Pennsylvania Act by the provision for public access to MSDS or Hazardous Substance Fact Sheets. *See id.* § 7305(g).

E.

Employer Educational Programs

The district court held that section 7308, which requires employers to provide an education and training program, was preempted in the manufacturing sector by the virtually identical requirement in the federal Hazard Communication Standard. *See* 623 F.2d at 1074. *See also* 29 C.F.R. § 1910.1200(h)(2). We agree that this requirement is preempted insofar as it requires employers in the manufacturing sector to conduct educational programs with respect to workplace hazards. It is not clear, however, that the Pennsylvania Act requires educational programs with respect to environmental as distinguished from workplace hazards. If the Pennsylvania authorities so construe the Act, the provision that employees be educated as to environmental hazards would not be preempted.

F.

Department Outreach Program

Section 7310 requires the department to develop outreach programs to inform employees and the public of their rights under the Act and to educate employers, employees, and the public about hazardous substances. The district court held that this section was preempted only to the extent that it applies to the disclosure of workplace hazards to employees in the manufacturing sector. We agree that section 7310 is preempted by the OSH Act in the manufacturing sector

to this extent only because the purpose of such an outreach program is hazard communication.

II.

Constitutional Issues

One group of plaintiffs, who filed the Manufacturers Association of Tri-County complaint, urges that while the preemption issues are strictly legal, and resolvable on cross-motions for summary judgment, the counts in their complaint alleging an unconstitutional burden on interstate commerce and an unlawful taking of property without just compensation raise factual issues which are not resolvable as a matter of law. Thus, they urge, the district court should not have granted summary judgment on those counts.

This contention was not made to the district court, and the parties in that court proceeded on the assumption that the motion for summary judgment applied to the entire complaint. Thus the question before us is not whether these plaintiffs were deprived, procedurally, of the opportunity to make a factual record, but whether given the allegations in their complaint and the supporting affidavits on which they rely, they have stated a claim upon which relief could, as a matter of law, be granted. The plaintiffs raise two constitutional challenges: a fifth amendment taking challenge and an article I commerce clause challenge.

The district court addressed both challenges. Noting that in *Hughey*, 774 F.2d at 598, this court upheld the virtually identical provisions of the New Jersey Right-to-Know Act, the court held that the Pennsylvania Act did not constitute a taking. *See* 623 F. Supp. at 1076. On this issue *Hughey* controls. The complaint fails to state a claim under the fifth amendment taking clause. As to the Commerce Clause,

the district court applied the criteria for determining dormant commerce clause challenges announced in *Pike v. Bruce Church, Inc.*:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits.

397 U.S. 137, 142 (1970). The complaint does not allege discrimination against interstate commerce and the affidavits the plaintiffs filed in support of their commerce clause challenge fail to identify any burdens on interstate commerce that would be excess in relation to the local health, safety, and environmental interests served by the Pennsylvania Act. Thus we agree with the district court that both the constitutional challenges are deficient as a matter of law.

Conclusion

The judgment of the district court will be affirmed insofar as it upholds the Act outside the manufacturing sector. It will be affirmed in part and reversed in part insofar as it holds that the Act is preempted in the manufacturing sector, and the case will be remanded for the entry of a judgment consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5032 and 86-5066

Manufacturers Association of Tri-County, et. al.

vs.

James W. Knepper, Jr., et. al.

Pennsylvania American Federation of Labor, et. al.,
Intervenors—Appellants

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 11, 1986.

Circuit Judge

Dated: November 24, 1986

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MANUFACTURERS ASSOCIATION OF TRI COUNTY, et al.,
Plaintiffs

vs.

JAMES KNEPPER, JR., et al.,
Defendants

and

PENNSYLVANIA AMERICAN FEDERATION OF LABOR - CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.,
Intervenors

CIVIL ACTION NO. 85-1027

PENNSYLVANIA FOUNDRYMEN'S ASSOCIATION, et al.,
Plaintiffs

vs.

JAMES W. KNEPPER, JR., et al.,
Defendants

and

PENNSYLVANIA AMERICAN FEDERATION OF LABOR - CONGRESS OF INDUSTRIAL ORGANIZATIONS, et al.,
Intervenors

MEMORANDUM

I. Introduction.

Plaintiffs, defendants and intervenors have filed cross motions for summary judgment. Plaintiffs are certain manufacturers, manufacturing associations and non-manufacturers doing business in Pennsylvania. Defendants are James W. Knepper, Jr., Secretary of the Department of Labor and Industry, Herbert Thieme, Deputy Secretary for Administration of the Department of Labor and Industry, the Pennsylvania Department of Labor and Industry, and the Commonwealth of Pennsylvania. Intervenors are the Pennsylvania American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"). The International Union (also known as United Auto Workers) has also filed an amicus curiae brief. This consolidated action[1] arises from the enactment of the Pennsylvania Worker and Community Right to Know Act, P.L. 734 No. 159, 35 P.S. §7301.1 et seq. ("Right to Know Act") which establishes a statewide program for communicating information concerning hazardous substance to employees and the general public. Plaintiff's primary contention is that, based upon the recent decision of New Jersey State Chamber of Commerce v. Hughey, Nos. 85-5087, 85-5088 and 85-5095 (3d Cir. October 10, 1985), the Right to Know Act is preempted by §18 of the Occupational Health and Safety Act ("OSH Act") (29 U.S.C. §667), and the Hazard Communication Standard ("The Standard") (29 C.F.R. §1910.1200) as it applies, (1) to employers who are included within the Standard Industrial Classification ("SIC") Codes 20-39 and (2) as it applies to employers outside SIC Codes 20-39.[2] In accordance with

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1. Upon motion of the parties, Civil Action No. 85-1028 was consolidated into Civil Action No. 85-1027.

2. The Standard consists of regulations adopted by OSHA pursuant to the OSH Act. SIC Codes 20-39 consist primarily of categories of

Hughey defendants and intervenors acknowledge that certain provisions of the Right to Know Act are preempted, but nevertheless maintain that the remainder of the Right to Know Act should be enforced, and that the preempted sections of the Act can be severed. In addition to their preemption argument plaintiffs also assert that the Right to Know Act imposes an excessive burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution and deprives plaintiffs of their property rights in trade secrets and confidential information without just compensation.

For the reasons set forth below, we conclude that the Right to Know Act is entirely preempted by federal law to the extent it requires employers in the manufacturing sector to identify and disclose information concerning workplace hazards. The Right to Know Act is not preempted as it applies to employers in the non-manufacturing sector, nor as it requires all employers to disclose information relating to environmental hazards, except for the labeling requirement in the manufacturing sector. We also conclude that the Right to Know Act does not violate the Commerce Clause or constitute a taking without just compensation.

II. Background.

A. The Pennsylvania Worker and Community Right to Know Act.

On October 5, 1984 the Governor of Pennsylvania signed the Right to Know Act into law, to become effective on October 5, 1985.[3] The purpose of the Act inter

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manufacturers as set forth in the Standard Industrial Classification Manual published by the U.S. Office of Management and Budget. For purposes of this Memorandum we will refer to SIC Codes 20-39 as the manufacturing sector.

3. On August 28, 1985 we stayed the implementation and enforcement of the Act until December 4, 1985. On December 3, 1985 we again stayed enforcement of the Act until this decision is rendered.

alia is "to ensure that employees, their families and the general public be given current information concerning the nature of the hazardous substances with which they may come in contact and full information concerning the health hazards of these hazardous substances." 35 P.S. §7301 (Preamble to the Act). It establishes a comprehensive statutory scheme for (1) identifying and (2) communicating to employees, emergency response agencies, health care professionals, and the general public information concerning hazardous chemicals employed in the workplace. These objectives are accomplished primarily through the following procedures.

Within 180 days of the effective date of the Right to Know Act (October 5, 1985) the Pennsylvania Department of Labor and Industry is required to compile a list of hazardous substances and designate those substances which are considered to be "special" or "environmental" hazards. 35 P.S. §7303. Every employer is required to complete a hazardous substance survey form ("HSSF") for each workplace, listing the designated hazardous substances which were present during the past year. 35 P.S. §7303 (e). This form must be retained on file at the workplace and updated every two years. Id. The employer is also required, upon the written request of any person, to complete an environmental hazard survey ("EHS") for the workplace which discloses "those [designated] substances emitted, discharged or disposed of from the workplace." 35 P.S. §3703 (g).

The primary burden of disclosing hazardous substances falls upon manufacturers and suppliers of chemicals. The Right to Know Act provides that "every supplier, as a condition of doing business in this Commonwealth, shall ensure that the container of any chemical which is delivered to a point within this Commonwealth or which is produced within this Commonwealth is clearly labeled in the manner required by section 6." 35 P.S. §7304 (a) (footnote omitted). Section 6, in turn specifies the information that must be

disclosed. 35 P.S. §7306 (a). The Right to Know Act further provides that within two (2) years all containers, used by entities covered by the Act, regardless of whether they contain hazardous substances, must be labeled. 35 P.S. §7306 (a) (4). In addition, employers are required to place labels at or near all pipeline ports. 35 P.S. 7306 (c).

Similarly, manufacturers, importers and suppliers must prepare a material safety data sheet ("MSDS") for each designated "hazardous substance or hazardous mixture they produce or import, and shall ensure that all purchasers of hazardous substances or hazardous mixtures are provided with an appropriate MSDS. . . ." 35 P.S. §7304 (b). The Department of Labor and Industry must also be supplied with a copy of each MSDS. The MSDS must incorporate certain information, including the chemical name, its physical characteristics, and its health hazards. Id.

The Right to Know Act also permits employers, manufacturers, etc., to withhold the identity of a chemical substance as a trade secret. 35 P.S. §7311. This protection is not absolute and the claimant must satisfy the criteria in §7311 (a). In no case is the claimant permitted to withhold a chemical's identity from a treating physician or nurse. The claimant may, however, require the physician or nurse to sign a confidentiality agreement. 35 P.S. §7311 (b).

Finally, employers are obligated to disclose the information required by the Right to Know Act to (1) employees and (2) the community. Employers must post in the workplace a listing of all designated hazardous substances present and make available in the work area a MSDS for each hazardous substance to which the employees may be exposed. 35 P.S. §7307. Employers are also required to provide, at least annually, educational and training programs for employees exposed to hazardous substances. 35 P.S. §7308. With respect to public disclosure, employers must make available to the

community, including local police, fire and emergency response personnel, copies of HSSF's, EHS's and MSDS's upon demand. 35 P.S. §7305.

B. The Hazard Communication Standard.

In 1970 Congress enacted the Occupational Safety and Health Act (OSH Act), 29 U.S.C. §§651 et seq. "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651 (b). Pursuant to §655 of the OSH Act, the Secretary of Labor was given the authority to promulgate standards to implement its purposes, and on November 23, 1983, the Occupational Safety and Health Agency ("OSHA") published the final Hazard Communication Standard. The stated purpose of the Standard is to "insure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employees within the manufacturing sector." 29 C.F.R. §1910.1200 (a) (1). By its terms it is applicable to all employers in SIC Codes 20 – 39.

The Standard is practically duplicative of the Right to Know Act and likewise can be broken down in two parts. First, chemical manufacturers and importers must assess the hazards of chemicals which they produce or import. Second employers must communicate the hazards to their employees by means of a hazardous communication program which "includes at least the mandated container labeling, material safety data sheets ("MSDS"), and an employee training program." 48 Fed. Reg. 53,336.

The MSDS is the principle instrumentality for transmitting hazard information. 48. Fed. Reg. 53,305. Chemical manufacturers and importers must develop a MSDS for each substance they identify as hazardous which includes the name(s) of the chemical, its physical and chemical characteristics and its health and safety characteristics. 29 C.F.R. §1910.1200 (g). The MSDS's must also be readily

available to employees. In addition, manufacturers, importers, and distributors must ensure that each container of hazardous chemicals leaving the workplace is appropriately labeled and all employers must ensure that containers utilized in the workplace are labeled. 29 C.F.R. §1910.1200 (f). The hazard communication program must also include an employee training program designed to provide employees with the skills necessary to detect hazardous conditions and to take appropriate protective measures. 29 C.F.R. §1910.1200 (h) (2).

Finally, the Standard provides for trade secret protection. 29 C.F.R. §1910.1200 (1). The employer may withhold the identity of a chemical substance if it satisfies the requirements contained in 29 C.F.R. §1910.1200 (i) (1). Notwithstanding this provision, employers must reveal the identity of a substance to a treating physician or nurse if they determine that a medical emergency exists. 29 C.F.R. §1910.1200 (i) (2). Under certain circumstances, the employer may require a written statement of need and confidentiality agreement. Id.

III. Discussion.

A. Application to Employers covered by the SIC Codes 20 - 39.

The United States Supreme Court recently set forth the standards for determining preemption of state law in Hillsborough County v. Automated Medical Laboratories, Inc., ____ U.S. ____, ____, 85 L.Ed.2d 714, 721, 105 S.Ct. 2371, 2375 (1985) as follows:

> [3] It is a familiar and well-established principle that the Supremacy Clause, US Const, Art VI, cl 2, invalidates state laws that "interfere with, or are contrary to" federal law. Gibbons v Ogden, 9 Wheat 1, 211, 6 L Ed 23 (1824) (Marshall, C. J.). Under the

Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Jones v Rath Packing Co., 430 US 519, 525, 51 L Ed 2d 604, 97 S Ct 1305 (1977). In the absence of express pre-emptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Rice v Santa Fe Elevator Corp., 331 US 218, 230 91 L Ed 1447, 67 S Ct 1146 (1947). Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Ibid.; see Hines v. Davidowitz, 312 US 52, 85 L Ed 581, 61 S Ct 399 (1941).

[4] Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 US 132, 142 – 143, 10 L Ed 2d 248, 83 S Ct 1210 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, supra, at 67, 85 L Ed 581, 61 S Ct 399. See generally Capital Cities Cable, Inc. v. Crisp, 467 US ____, ____, 81 L Ed 2d 580, 104 S Ct 2694 (1984).

In addition, state laws can be preempted by federal regulations as well as by federal statutes. Id. at ____, 85 L.Ed.2d at 721, 105 S.Ct. at 2375; Capital Cities Cable, Inc. v. Crisp,

467 U.S. ____, 81 L.Ed.2d 580, 104 S.Ct. 2694 (1984).

In the present case, Congress has expressly provided for the preemption of state laws in §18 of the OSH Act which provides in pertinent part:

> (a) Assertion of State standards in absence of applicable Federal standards Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.[4]

OSHA has also expressed its intent to preempt state law in this area. The OSHA Standard states it "is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject." 29 C.F.R. 1910.1200 (a) (2) (emphasis added).

In New Jersey State Chamber of Commerce v. Hughey, supra, the Third Circuit recently examined the New Jersey Worker and Community Right to Know Act, N.J.S.A. 34:5A-1, et seq., ("New Jersey Right to Know Act"), a statute whose purpose and framework is substantially identical to the Pennsylvania Right to Know Act. In Hughey the plaintiff contended that the entire statute was expressly preempted by section 18 of the federal OSH Act. The court rejected plaintiff's contention on the grounds that section 18 was intended to preempt only state laws which sought to regulate employee health and safety. Hughey, slip op. at 13 –14. Instead, applying the principles of implied preemp-

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4. Subsection (b) provides, however, that:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. §667 (b).

Pennsylvania has not submitted such a plan.

tion, the court reviewed each section of the New Jersey Right to Know Act to determine whether "Congress would have intended to preempt such a provision." Hughey, slip op. at 15. More importantly for our purposes, the court developed the following standards for determining preemption:

> A section should be held to be preempted, therefore, only to the extent that: 1) it is expressly preempted because is regulates communication of hazards to employees in the manufacturing sector; 2) it is impossible to comply both with state law and with federal law; or 3) the provision serves as an obstacle to the accomplishment of Congress' object in the OSH Act to promote safe and healthful working conditions.

Id. at 15.

With these principles in mind, we will examine each disputed section of the Pennsylvania Right to Know Act.[5]

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5. The following sections presented no question of preemption:

7301	Short Title
7302	Definitions
7303 (a)	Hazardous Substance List
7303 (b)	Additions to hazardous substance list
7303 (c)	Deletions from hazardous substance list
7303 (d)	Special hazards and environmental hazards
7303 (i)	Authority to modify filing requirements
7309	Health and Exposure Records
7311	Trade Secrets
7312	Risk to public health
7313	Protection of employees
7314	Complaints and investigations
7315	Judicial review and enforcement
7316	False statements and intentional omissions
7317	Rules and regulations
7318	Special applications
7319	Construction of act
7320	Severability

1) The Hazardous Substance Survey Form.

Section 7303 (e) requires employers to complete a hazardous substance survey form for each workplace. Both plaintiff and defendant agree that this provision is preempted because Section 7303 (e) is substantially identical to section 34:5A-5 of the New Jersey law which the Hughey court found to be preempted in the manufacturing sector. Both statutes contemplate the creation of several hazardous substances lists, including one which identifies only environmental hazards. As the court in Hughey stated:

> any hazardous substance listed as a workplace hazard pursuant to section 34:5A-5 (a), and not listed as an environmental hazard pursuant to section 34:5A-4 (a) is deemed to be one posing a specific threat to workers. It appears therefore that the primary purpose of section 34:5A-7 (a) is the promotion of occupational health and safety through hazard communication. The federal Hazard Communication Standard expressly preempts section 34:5A-7 (a) in the manufacturing sector.

Hughey, slip. op. at 18 – 19.

The only difference between the two state statutes is that the Pennsylvania Right to Know Act does not provide specifically for a workplace hazardous substance list. Intervenors, however, contend that section 7303 (e) is not preempted because the Pennsylvania definition of a hazardous substance is different from the New Jersey definition. Intervenors contend that the New Jersey statute, as demonstrated by its definition of a workplace hazard, was intended to protect primarily the employee while the Pennsylvania Act intended to protect both the employee and the public. This contention is belied by the fact that New Jersey definition of a workplace hazard includes "any environmental hazardous substance" 34:5A-5 (a). By including environmental hazards in its definition of a workplace hazard, it appears

that the New Jersey Right to Know Act does not have the single minded purpose which intervenors assert. Thus section 7303 (e) is preempted in the manufacturing sector. Since 7303 (e) is preempted sections 7303 (f), (i) and (j), sections 7305 (a), (c) and (g), and sections 7307 (a) and (b) are also preempted to the extent they pertain to the hazardous substance survey forms.

2) Environmental Hazard Survey.

Section 7303 (g) also requires employers to complete environmental hazard surveys for each workplace. In Hughey, the court held that the New Jersey environmental hazard survey, section 34:5A-7 (a), was not preempted because the reporting of environmental hazards was not a concern of the OSHA Standards. Hughey, slip. op. at 18. Plaintiffs, however, assert that the Pennsylvania environmental hazard survey is preempted because section 7303 (g) was intended to regulate occupational health and safety. This argument is based on the fact that the environmental aspects of the New Jersey law are administered by the New Jersey Department of Environmental Protection, while the environmental aspects of the Pennsylvania statute are administered by the Department of Labor and Industry. In support of their position, plaintiffs rely upon the following language from Hughey:

> Section 34:5A-7 (b) is not preempted, since it requires reporting of environmental hazards to agencies concerned with public health and safety, a matter not governed by OSHA Standards.

Hughey, slip. op. at 18.

In essence, plaintiffs argue that it is the designation of the state agency which is to administer the law that is controlling. Interpretating this language, we conclude, however, that it is the purpose of the statute which is critical, not the agency selected to implement the law. Clearly section 7303

(g) is concerned with the protection of the public and is not an attempt to regulate employee safety.

Plaintiffs further argue that the legislative intent to regulate employee safety is demonstrated by section 7303 (h) which provides in pertinent part:

> (h) **Onsite testing.**—Upon the request to the department, and for the good cause shown and upon consultation with the interested parties involved, the department may conduct at its expense onsite testing or use such other methods as will provide more exact information concerning the environmental hazards reported in the environmental hazards survey under subsection (g). . . . The department shall not conduct onsite testing which has already been conducted by OSHA.

Plaintiffs contend that the last sentence of this section would have no meaning unless the legislature intended that the environmental hazards reported in the survey would be substances regulated and monitored by OSHA. Contrary to plaintiffs' contention, we find that section 7303 (h) only attempts to prevent duplicative onsite testing and does not have the far reaching implication suggested by plaintiffs. Section 7303 (g) is therefore not preempted. Likewise section 7303 (h) is not preempted.

3) Labeling.

Pursuant to section 7304 (a) suppliers of chemicals must ensure that every container is labeled in accordance with section 7306 which, in turn, provides the specific labeling requirements. In Hughey, the court held the New Jersey labeling provision 34:5A-14, which provided for the labeling of both workplace and environmental hazards, was preempted "to the extent they require labeling of workplace hazards in the manufacturing sector." Hughey, slip op. at 20. With respect to environmental hazards, the court remanded this issue to the district court to determine whether section

34:5A-14 was an obstacle to the accomplishment of the purposes of the OSH Act. Id. at 20-21. In accordance with Hughey, sections 7304 (a) and 7306 are apparently preempted in the manufacturing sector as they pertain to the labeling of workplace hazards. Defendants acknowledge that certain portions of sections 7304 (a) and 7306 are preempted, but maintain preemption is to be determined by the customer of the employer.[6] For example, if an employer sells to a manufacturer then a label is not required, but if an employer sells to a non-manufacturer, then a label is required. Defendants draw this distinction on the basis that the labeling requirement is only preempted where its purpose is to regulate disclosure of hazard information to manufacturing employers. As defendants point out, sections 7304 (a) and 7306 require that hazard information must be transmitted to both the manufacturing sector and the non-manufacturing sector, by the labeling of containers. The court in Hughey held that a section is preempted only "to the extent that it is expressly preempted because it regulates communication of hazards to employees in the manufacturing sector" Hughey, slip op. at 15. Applying this rationale, we conclude that sections 7304 (a) and 7306 are not preempted to the extent they require the labeling of containers destined for non-manufacturing employers. Our conclusion is not inconsistent with the Hughey decision because the labeling provision of New Jersey statute requirements did not provide for the disclosure of hazard information beyond the manufacturing sector.

The remaining issue is whether the labeling of environmental hazards is also preempted in the manufac-

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6. Intervenors argue that the labeling requirements are not preempted because they are not primarily tied to the concerns of employees in the manufacturing sector. This argument overlooks the fact the OSHA has promulgated standards covering labeling of workplace hazards. We do not believe that our conclusion is changed because the labeling requirement serves other purposes. Additionally, this argument was implictly rejected by the Hughey court when it held that the workplace survey was entirely preempted.

turing sector. Plaintiffs, relying upon section 7318, argue that the labeling of environmental hazards is primarily intended to protect the employee. Section 7318 provides:

> (d) **Employers without employees.**—An employer shall not be required to comply with the requirement of sections 3 (e), 5 (e), 6 (a) (1) through (5), 6 (b) through (g), 7 and 8 for any period of time during which the employer does not have any present employees. (footnote omitted)

It is clear under this language that employers who do not have any employees are not required to abide by most of the labeling requirements. Since labeling is required only when employees are involved, this exception indicates that the primary purpose of the labeling requirement was to protect employees. Therefore we agree with plaintiffs' interpretation and conclude that sections 7304 (a) and 7306 are preempted in the manufacturing sector to the extent they require manufacturing employers to label containers, and to the extent they require suppliers to label containers to be shipped to manufacturing employers.

4) The Material Safety Data Sheets

In accordance with section 7304 (b) manufacturers, importers, and suppliers must ensure that material safety data sheets accompany each initial shipment. The MSDS must also be provided for each container delivered to a point within the state of Pennsylvania. Unlike the previous provisions section 7304 (b) has no counterpart in the New Jersey statute. As was the case with labeling, the federal Hazard Communication Standard already provides for the development of MSDS's. 29 C.F.R. §1910.1200 (g). Therefore, sections 7304 (b) (c) (d) (e) (f) and (g) are expressly preempted only to the extent they require manufacturers, importers, and suppliers to provide a MSDS for each container to be delivered to an employer in the manufacturing sector which contains

a workplace hazard.[7] As a result sections 7304 (b) (3) and (4) are also preempted to the same extent. However, with respect to environmental hazards, these sections are not preempted. There is no indication that the regulation of environmental hazards by section 7304 (b) was intended to promote only employee safety and neither party has argued that requiring MSDS's for environmental hazards would operate as an obstacle to the accomplishment of federal objectives. Since section 7304 (b) is preempted in the manufacturing sector sections 7303 (f) and (j), 7305 (a) (b) (c) (d) (e) and (g), and 7307 (a) and (b) are also preempted to the extent they pertain to MSDS's in the manufacturing sector.[8]

5) Employer Educational Program.

Section 7308 requires employers to provide, at least annually, an education and training program. Defendants and intervenors concede that this section is preempted. Additionally, noting that Section 7308 is substantially identical to the one provided in the Federal Hazard Communication Standard, we conclude that section 7308 is preempted. See 29 C.F.R. §1910.1200 (h) (2).

6) Outreach Program.

Section 7310 (a) requires the Department of Labor and Industry to develop outreach programs to inform employees and the public about their rights under the Act and about hazardous substances. We find, however, that section 7310 (a) is preempted only to the extent it applies to the disclosure of workplace hazards to employees in the manufacturing sec-

7. A workplace hazard is a substance found on the Hazardous Substance list but not found on the environmental substance list.

8. We recognize an apparent inconsistency in holding that labeling of environmental hazards is preempted in the manufacturing sector, whereas the preparation of MSDSs for environmental hazards is not. This situation results from the fact that Section 7318 (d) is limited to labeling. We do not know if this result was intended.

tor. Similarly, section 7310 (d) is preempted as it pertains to employees in the manufacturing sector.

B. Application to employers not within the SIC Codes 20 – 39.

Because the federal provisions apply only to employers within the SIC Codes 20-39, the Pennsylvania law is not preempted as to other employers. See Hughey, slip op. at 18. Plaintiffs argue, however, that in the event that any preemption is adjudicated, the Pennsylvania legislature intended that the entire statute be declared unconstitutional. In support of this position plaintiffs rely on §19 (d) of the Right to Know Act which provides:

> (d) **Review of preemption.**—Should Federal Government preemption be finally adjudicated and result in lessening the burden on any employer to meet the requirements of this act, it is the intent that the General Assembly reexamine this act so that all employers hereunder shall be reexamined as to requirements necessary in meeting the standards of this act so as to treat all employers fairly and equitably.

Section 19 (d) states only that the General Assembly intends to re-examine, and not abandon the Right to Know Act, if federal preemption is adjudicated. This view finds support in Section 20 of the Right to Know Act, which specifically contemplates severability under the circumstances presented by this case.[9] We conclude that the Right to Know Act is not preempted as it applies to employers not within the SIC Codes 20-39.

C. Severability.

We must now look to Section 20 and Pennsylvania law

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9. 35 P.S. §7320.

to determine whether the preempted provisions may be severed from the Right to Know Act or whether the entire statute must fall. Commonwealth, Department of Education v. First School, 471 Pa. 471, 370 A.2d 702 (1977). The standards for determining severability under Pennsylvania law are set forth in the Statutory Construction Act:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S. §1925.

Interpreting this section, the Pennsylvania Supreme Court in Saulsbury v. Bethlehem Steel Co., 413 Pa. 316, 320, 196 A.2d 664, 666 (1964) stated:

> "[A] statute or ordinance may be partially valid and partially invalid, and . . . if the provisions are distinct and not so interwoven as to be inseparable . . . courts should sustain the valid portions." (citations omitted).

There is a strong presumption in favor of severability where a statute contains a severability clause. Commonwealth, Department of Education v. First School, supra.

Applying these principles, we find that the entire statute should not fall because the preempted provisions are not

"so essentially and inseparably connected" with the non-preempted provisions. The Right to Know Act, while less comprehensive, still remains an effective means for regulating environmental hazards in the manufacturing sector and for regulating workplace and environmental hazards in the non-manufacturing sector. We also conclude that legislative intent will be advanced by severing the preempted provisions. The Act is a broad statute designed to protect the public and the employee by regulating environmental and workplace hazards. This purpose will not be defeated by the limited preemption which we have adjudicated.

D. Trade Secret Protection.

Plaintiffs argue that the provisions of the Right to Know Act relating to trade secrets result in a taking of plaintiff's property without due process of law because the Act does not provide for an adequate remedy against the Commonwealth of Pennsylvania. This contention can be disposed of without much discussion. The court in Hughey found that the trade secret provisions of the New Jersey Right to Know Act did not constitute a taking. Hughey, slip op. at 25. The Pennsylvania and New Jersey trade secret provisions are similar in nature and we conclude the Pennsylvania Right to Know Act does not constitute a taking. Since there has not been a taking of plaintiffs' property we need not consider plaintiffs' argument that the Act does not provide an adequate remedy against the Commonwealth.

E. Violation of the Commerce Clause.

Finally, plaintiffs argue that the Right to Know Act violates the Commerce Clause because it imposes an undue burden on interstate commerce. They contend that the Right to Know Act will substantially increase the cost of goods moving in interstate commerce. To the contrary, defendants and intervenors argue that the impact on interstate commerce is merely speculative.

In Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L.Ed.2d 174, 178, 90 S.Ct. 844, 847 (1970) the Supreme Court established the following criteria for determining whether a state statute violates the Commerce Clause:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 US 400, 443, 4 L Ed2d 852, 856, 80 S Ct 813, 78 ALR2d 1294.

We should also note that safety regulations are entitled to "a strong presumption of validity," Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524, 3 L.Ed.2d 1003, 1007, 79 S.Ct. 962, 965 (1959). Kassel v. Consolidated Freightways Corp., 750 U.S. 662, 67 L.Ed.2d 580, 101 S.Ct. 1309 (1981).

In the instant case, the Right to Know Act operates evenhandedly and thus the relevant inquiry is whether the burden on interstate commerce outweighs the local benefit. Plaintiffs have failed to demonstrate that the Right to Know Act will substantially burden interstate commerce. While we recognize that implementation of the Act may be costly and in that sense may burden interstate commerce, we cannot conclude that the burden outweighs the benefit. As a result we find that the Right to Know Act does not violate the Commerce Clause.

An appropriate order will be issued.

William W. Caldwell
United States District Judge

Date: December 12, 1985

§655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the

Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or com-

ments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only

if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, support-

ed by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropri-

ate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time,

publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment

and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards

under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

§ 1910.1200 Hazard communication.

(a) *Purpose.* (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

(2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.) which deals with state jurisdiction and state plans.

(b) *Scope and application.* (1) This section requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers in SIC Codes 20 through 39 (Division D, Standard Industrial Classification Manual) to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training. In addition, this section requires distributors to transmit the required information to employers in SIC Codes 20-39.

(2) This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.

(3) This section applies to laboratories only as follows:

(i) Employers shall ensure that labels on incoming con-

tainers of hazardous chemicals are not removed or defaced;

(ii) Employers shall maintain any material safety data sheets that are received with incoming shipments of hazardous chemicals, and ensure that they are readily accessible to laboratory employees; and,

(iii) Employers shall ensure that laboratory employees are apprised of the hazards of the chemicals in their workplaces in accordance with paragraph (h) of this section.

(4) This section does not require labeling of the following chemicals:

(i) Any pesticide as such term is defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.), when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Environmental Protection Agency;

(ii) Any food, food additive, color additive, drug, or cosmetic, including materials intended for use as ingredients in such products (e.g., flavors and fragrances), as such terms are defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.) and regulations issued under that Act, when they are subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Food and Drug Administration;

(iii) Any distilled spirits (beverage alcohols), wine, or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. 201 et seq.) and regulations issued under that Act, when subject to the labeling requirements of that Act and labeling regulations issued under that Act by the Bureau of Alcohol, Tobacco, and Firearms; and,

(iv) Any consumer product or hazardous substance as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, when subject to a consumer product safety standard or labeling requirement of those Acts, or regulations issued under those Acts by the Consumer Product Safety Commission.

(5) This section does not apply to:

(i) Any hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 et seq.), when subject to regulations issued under that Act by the Environmental Protection Agency;

(ii) Tobacco or tobacco products;

(iii) Wood or wood products;

(iv) Articles; and,

(v) Foods, drugs, or cosmetics intended for personal consumption by employees while in the workplace.

(c) *Definitions.* "Article" means a manufactured item: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use.

"Assistant Secretary" means the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee.

"Chemical" means any element, chemical compound or mixture of elements and/or components.

"Chemical manufacturer" means an employer in SIC Codes 20 through 39 with a workplace where chemical(s) are produced for use or distribution.

"Chemical name" means the scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemistry (IUPAC) or the Chemical Abstracts Service (CAS) rules of nomenclature, or a name which will clearly identify the chemical for the purpose of conducting a hazard evaluation.

"Combustible liquid" means any liquid having a flashpoint at or above 100 °F (37.8 °C), but below 200 °F (93.3 °C), except any mixture having components with flashpoints

of 200°F (93.3°C), or higher, the total volume of which make up 99 percent or more of the total volume of the mixture.

"Common name" means any designation or identification such as code name, code number, trade name, brand name or generic name used to identify a chemical other than by its chemical name.

"Compressed gas" means:

(i) A gas or mixture of gases having, in a container, an absolute pressure exceeding 40 psi at 70°F (21.1°C); or

(ii) A gas or mixture of gases having, in a container, an absolute pressure exceeding 104 psi at 130°F (54.4°C) regardless of the pressure at 70°F (21.1°C); or

(iii) A liquid having a vapor pressure exceeding 40 psi at 100°F (37.8°C) as determined by ASTM D-323-72.

"Container" means any bag, barrel, bottle, box, can, cylinder, drum, reaction vessel, storage tank, or the like that contains a hazardous chemical. For purposes of this section, pipes or piping systems are not considered to be containers.

"Designated representative" means any individual or organization to whom an employee gives written authorization to exercise such employee's rights under this section. A recognized or certified collective bargaining agent shall be treated automatically as a designated representative without regard to written employee authorization.

"Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health and Human Services, or designee.

"Distributor" means a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to manufacturing purchasers.

"Employee" means a worker employed by an employer in a workplace in SIC Codes 20 through 39 who may be exposed to hazardous chemicals under normal operating conditions or foreseeable emergencies, including, but not

limited to production workers, line supervisors, and repair or maintenance personnel. Office workers, grounds maintenance personnel, security personnel or non-resident management are generally not included, unless their job performance routinely involves potential exposure to hazardous chemicals.

"Employer" means a person engaged in a business within SIC Codes 20 through 39 where chemicals are either used, or are produced for use or distribution.

"Explosive" means a chemical that causes a sudden, almost instantaneous release of pressure, gas, and heat when subjected to sudden shock, pressure, or high temperature.

"Exposure" or "exposed" means that an employee is subjected to a hazardous chemical in the course of employment through any route of entry (inhalation, ingestion, skin contact or absorption, etc.), and includes potential (e.g., accidental or possible) exposure.

"Flammable" means a chemical that falls into one of the following categories:

(i) "Aerosol, flammable" means an aerosol that, when tested by the method described in 16 CFR 1500.45, yields a flame projection exceeding 18 inches at full valve opening, or a flashback (a flame extending back to the valve) at any degree of valve opening;

(ii) "Gas, flammable" means:

(A) A gas that, at ambient temperature and pressure, forms a flammable mixture with air at a concentration of thirteen (13) percent by volume or less; or

(B) A gas that, at ambient temperature and pressure, forms a range of flammable mixtures with air wider than twelve (12) percent by volume, regardless of the lower limit;

(iii) "Liquid, flammable" means any liquid having a flashpoint below 100°F (37.8°C), except any mixture having components with flashpoints of 100°F (37.8°C) or higher, the total of which make up 99 percent or more of

the total volume of the mixture.

(iv) "Solid, flammable" means a solid, other than a blasting agent or explosive as defined in § 1910.109(a), that is liable to cause fire through friction, absorption of moisture, spontaneous chemical change, or retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and persistently as to create a serious hazard. A chemical shall be considered to be a flammable solid if, when tested by the method described in 16 CFR 1500.44, it ignites and burns with a self-sustained flame at a rate greater than one-tenth of an inch per second along its major axis.

"Flashpoint" means the minimum temperature at which a liquid gives off a vapor in sufficient concentration to ignite when tested as follows:

(i) Tagliabue Closed Tester (See American National Standard Method of Test for Flash Point by Tag Closed Tester, Z11.24-1979 (ASTM D 56-79)) for liquids with a viscosity of less than 45 Saybolt Universal Seconds (SUS) at 100°F (37.8°C), that do not contain suspended solids and do not have a tendency to form a surface film under test; or

(ii) Pensky-Martens Closed Tester (see American National Standard Method of Test for Flash Point by Pensky-Martens Closed Tester, Z11.7-1979 (ASTM D93-79)) for liquids with a viscosity equal to or greater than 45 SUS a 100°F (37.8°C), or that contain suspended solids, or that have a tendency to form a surface film under test; or

(iii) Setaflash Closed Tester (see American National Standard Method of Test for Flash Point by Setaflash Closed Tester (ASTM D3278-78)).

Organic peroxides, which undergo autoaccelerating thermal decomposition, are excluded from any of the flashpoint determination methods specified above.

"Foreseeable emergency" means any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which

could result in an uncontrolled release of a hazardous chemical into the workplace.

"Hazard warning" means any words, pictures, symbols, or combination thereof appearing on a label or other appropriate form of warning which convey the hazards of the chemical(s) in the container(s).

"Hazardous chemical" means any chemical which is a physical hazard or a health hazard.

"Health hazard" means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term "health hazard" includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents which act on the hematopoietic system, and agents which damage the lungs, skin, eyes, or mucous membranes. Appendix A provides further definitions and explanations of the scope of health hazards covered by this section, and Appendix B describes the criteria to be used to determine whether or not a chemical is to be considered hazardous for purposes of this standard.

"Identity" means any chemical or common name which is indicated on the material safety data sheet (MSDS) for the chemical. The identity used shall permit cross-references to be made among the required list of hazardous chemicals, the label and the MSDS.

"Immediate use" means that the hazardous chemical will be under the control of and used only by the person who transfers it from a labeled container and only within the work shift in which it is transferred.

"Importer" means the first business with employees within the Customs Territory of the United States which receives hazardous chemicals produced in other countries for the purpose of supplying them to distributors or manufacturing purchasers within the United States.

"Label" means any written, printed, or graphic material displayed on or affixed to containers of hazardous chemicals.

"Manufacturing purchaser" means an employer with a workplace classified in SIC Codes 20 through 39 who purchases a hazardous chemical for use within that workplace.

"Material safety data sheet (MSDS)" means written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section.

"Mixture" means any combination of two or more chemicals if the combination is not, in whole or in part, the result of a chemical reaction.

"Organic peroxide" means an organic compound that contains the bivalent -O-O-structure and which may be considered to be a structural derivative of hydrogen peroxide where one or both of the hydrogen atoms has been replaced by an organic radical.

"Oxidizer" means a chemical other than a blasting agent or explosive as defined in § 1910.109(a), that initiates or promotes combustion in other materials, thereby causing fire either of itself or through the release of oxygen or other gases.

"Physical hazard" means a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive.

"Produce" means to manufacture, process, formulate, or repackage.

"Pyrophoric" means a chemical that will ignite spontaneously in air at a temperature of 130°F (54.4°C) or below.

"Responsible party" means someone who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

"Specific chemical identity" means the chemical name, Chemical Abstracts Service (CAS) Registry Number, or any

other information that reveals the precise chemical designation of the substance.

"Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

"Unstable (reactive)" means a chemical which in the pure state, or as produced or transported, will vigorously polymerize, decompose, condense, or will become self- reactive under conditions of shocks pressure or temperature.

"Use" means to package, handle, react, or transfer.

"Water-reactive" means a chemical that reacts with water to release a gas that is either flammable or presents a health hazard.

"Work area" means a room or defined space in a workplace where hazardous chemicals are produced or used, and where employees are present.

"Workplace" means an establishment at one geographical location containing one or more work areas.

(d) *Hazard determination.* (1) Chemical manufacturers and importers shall evaluate chemicals produced in their workplaces or imported by them to determine if they are hazardous. Employers are not required to evaluate chemicals unless they choose not to rely on the evaluation performed by the chemical manufacturer or importer for the chemical to satisfy this requirement.

(2) Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for

the scope of health hazards covered and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation, and the data to be reported.

(3) The chemical manufacturer, importer or employer evaluating chemicals shall treat the following sources as establishing that the chemicals listed in them are hazardous:

(i) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration (OSHA); or,

(ii) *Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment,* American Conference of Governmental Industrial Hygienists (ACGIH) (latest edition).

The chemical manufacturer, importer, or employer is still responsible for evaluating the hazards associated with the chemicals in these source lists in accordance with the requirements of the standard.

(4) Chemical manufacturers, importers and employers evaluating chemicals shall treat the following sources as establishing that a chemical is a carcinogen or potential carcinogen for hazard communication purposes:

(i) National Toxicology Program (NTP), *Annual Report on Carcinogens* (latest edition);

(ii) International Agency for Research on Cancer (IARC) *Monographs* (latest editions); or

(iii) 29 CFR Part 1910, Subpart Z, Toxic and Hazardous Substances, Occupational Safety and Health Administration.

Note: The *Registry of Toxic Effects of Chemical Substances* published by the National Institute for Occupational Safety and Health indicates whether a chemical has been found by NTP or IARC to be a potential carcinogen.

(5) The chemical manufacturer, importer or employer shall determine the hazards of mixtures of chemicals as follows:

(i) If a mixture has been tested as a whole to determine

its hazards, the results of such testing shall be used to determine whether the mixture is hazardous;

(ii) If a mixture has not been tested as a whole to determine whether the mixture is a health hazard, the mixture shall be assumed to present the same health hazards as do the components which comprise one percent (by weight or volume) or greater of the mixture, except that the mixture shall be assumed to present a carcinogenic hazard if it contains a component in concentrations of 0.1 percent or greater which is considered to be a carcinogen under paragraph (d)(4) of this section;

(iii) If a mixture has not been tested as a whole to determine whether the mixture is a physical hazard, the chemical manufacturer, importer, or employer may use whatever scientifically valid data is available to evaluate the physical hazard potential of the mixture; and

(iv) If the employer has evidence to indicate that a component present in the mixture in concentrations of less than one percent (or in the case of carcinogens, less than 0.1 percent) could be released in concentrations which would exceed an established OSHA permissible exposure limit or ACGIH Threshold Limit Value, or could present a health hazard to employees in those concentrations, the mixture shall be assumed to present the same hazard.

(6) Chemical manufacturers, importers, or employers evaluating chemicals shall describe in writing the procedures they use to determine the hazards of the chemical they evaluate. The written procedures are to be made available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director. The written description may be incorporated into the written hazard communication program required under paragraph (e) of this section.

(e) *Written hazard communication program.* (1) Employers shall develop and implement a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g),

and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas);

(ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas; and,

(iii) The methods the employer will use to inform any contractor employers with employees working in the employer's workplace of the hazardous chemicals their employees may be exposed to while performing their work, and any suggestions for appropriate protective measures.

(2) The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in this paragraph (e).

(3) The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 CFR 1910.20(e).

(f) *Labels and other forms of warning.* (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:

(i) Identity of the hazardous chemical(s);

(ii) Appropriate hazard warnings; and

(iii) Name and address of the chemical manufacturer, importer, or other responsible party.

(2) Chemical manufacturers, importers, or distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged, or marked in accordance with this section in a manner which does not conflict with the requirements of the Hazardous Materials Transportation Act (18 U.S.C. 1801 et seq.) and regulations issued under that Act by the Department of Transportation.

(3) If the hazardous chemical is regulated by OSHA in a substance-specific health standard, the chemical manufacturer, importer, distributor or employer shall ensure that the labels or other forms of warning used are in accordance with the requirements of that standard.

(4) Except as provided in paragraphs (f)(5) and (f)(6) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged, or marked with the following information.

(i) Identity of the hazardous chemical(s) contained therein; and

(ii) Appropriate hazard warnings.

(5) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required by paragraph (f)(4) of this section to be on a label. The written materials shall be readily accessible to the employees in their work area throughout each work shift.

(6) The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer.

(7) The employer shall not remove or deface existing labels on incoming containers of hazardous chemicals, unless the container is immediately marked with the required

information.

(8) The employer shall ensure that labels or other forms of warning are legible, in English, and prominently displayed on the container, or readily available in the work area throughout each work shift. Employers having employees who speak other languages may add the information in their language to the material presented, as long as the information is presented in English as well.

(9) The chemical manufacturer, importer, distributor or employer need not affix new labels to comply with this section if existing labels already convey the required information.

(g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

(2) Each material safety data sheet shall be in English and shall contain at least the following information:

(i) The identity used on the label, and, except as provided for in paragraph (f) of this section on trade secrets:

(A) If the hazardous chemical is a single substance, its chemical and common name(s);

(B) If the hazardous chemical is a mixture which has been tested as a whole to determine its hazards, the chemical and common name(s) of the ingredients which contribute to these known hazards, and the common name(s) of the mixture itself; or,

(C) If the hazardous chemical is a mixture which has not been tested as a whole:

(*1*) The chemical and common name(s) of all ingredients which have been determined to be health hazards, and which comprise 1% or greater of the composition, except that chemicals identified as carcinogens under paragraph (d)(4) of this section shall be listed if the concentrations are 0.1% or greater; and,

(2) The chemical and common name(s) of all ingredients which have been determined to present a physical hazard when present in the mixture;

(ii) Physical and chemical characteristics of the hazardous chemical (such as vapor pressure, flash point);

(iii) The physical hazards of the hazardous chemical, including the potential for fire, explosion, and reactivity;

(iv) The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical;

(v) The primary route(s) of entry;

(vi) The OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available;

(vii) Whether the hazardous chemical is listed in the National Toxicology Program (NTP) *Annual Report on Carcinogens* (latest edition) or has been found to be a potential carcinogen in the International Agency for Research on Cancer (IARC) *Monographs* (latest editions), or by OSHA;

(viii) Any generally applicable precautions for safe handling and use which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, including appropriate hygienic practices, protective measures during repair and maintenance of contaminated equipment, and procedures for clean-up of spills and leaks;

(ix) Any generally applicable control measures which are known to the chemical manufacturer, importer or employer preparing the material safety data sheet, such as appropriate engineering controls, work practices, or personal protective equipment;

(x) Emergency and first aid procedures;

(xi) The date of preparation of the material safety data

sheet or the last change to it; and,

(xii) The name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet, who can provide additional information on the hazardous chemical and appropriate emergency procedures, if necessary.

(3) If no relevant information is found for any given category on the material safety data sheet, the chemical manufacturer, importer or employer preparing the material safety data sheet shall mark it to indicate that no applicable information was found.

(4) Where complex mixtures have similar hazards and contents (i.e., the chemical ingredients are essentially the same, but the specific composition varies from mixture to mixture), the chemical manufacturer, importer or employer may prepare one material safety data sheet to apply to all of these similar mixtures.

(5) The chemical manufacturer, importer or employer preparing the material safety data sheet shall ensure that the information recorded accurately reflects the scientific evidence used in making the hazard determination. If the chemical manufacturer, importer or employer becomes newly aware of any significant information regarding the hazards of a chemical, or ways to protect against the hazards, this new information shall be added to the material safety data sheet within three months. If the chemical is not currently being produced or imported the chemical manufacturer or importer shall add the information to the material safety data sheet before the chemical is introduced into the workplace again.

(6) Chemical manufacturers or importers shall ensure that distributors and manufacturing purchasers of hazardous chemicals are provided an appropriate material safety data sheet with their initial shipment, and with the first shipment after a material safety data sheet is updated. The chemical manufacturer or importer shall either provide

material safety data sheets with the shipped containers or send them to the manufacturing purchaser prior to or at the time of the shipment. If the material safety data sheet is not provided with the shipment, the manufacturing purchaser shall obtain one from the chemical manufacturer, importer, or distributor as soon as possible.

(7) Distributors shall ensure that material safety data sheets, and updated information, are provided to other distributors and manufacturing purchasers of hazardous chemicals.

(8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

(9) Material safety data sheets may be kept in any form, including operating procedures, and may be designed to cover groups of hazardous chemicals in a work area where it may be more appropriate to address the hazards of a process rather than individual hazardous chemicals. However, the employer shall ensure that in all cases the required information is provided for each hazardous chemical, and is readily accessible during each work shift to employees when they are in their work area(s).

(10) Material safety data sheets shall also be made readily available, upon request, to designated representatives and to the Assistant Secretary, in accordance with the requirements of 29 CFR 1910.20(e). The Director shall also be given access to material safety data sheets in the same manner.

(h) *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

(1) Information. Employees shall be informed of.

(i) The requirements of this section;

(ii) Any operations in their work area where hazardous chemicals are present; and,

(iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

(2) *Training.* Employee training shall include at least:

(i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);

(ii) The physical and health hazards of the chemicals in the work area;

(iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,

(iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

(i) *Trade secrets.* (1) The chemical manufacturer, importer or employer may withhold the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical, from the material safety data sheet, provided that:

(i) The claim that the information withheld is a trade secret can be supported;

(ii) Information contained in the material safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

(iii) The material safety data sheet indicates that the specific chemical identity is being withheld as a trade secret; and,

(iv) The specific chemical identity is made available to health professionals, employees, and designated representatives, in accordance with the applicable provisions of this paragraph.

(2) Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a hazardous chemical is necessary for emergency or first-aid treatment, the chemical manufacturer, importer, or employer shall immediately disclose the specific chemical identity of a trade secret chemical to that treating physician or nurse, regardless of the existence of a written statement of need or a confidentiality agreement. The chemical manufacturer, importer, or employer may require a written statement of need and confidentiality agreement, in accordance with the provisions of paragraphs (i)(3) and (4) of this section, as soon as circumstances permit.

(3) In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i)(1) of this section, to a health professional (i.e., physician, industrial hygienist, toxicologist, or epidemiologist) providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

(i) the request is in writing;

(ii) The request describes with reasonable detail one or more of the following occupational health needs for the information:

(A) To assess the hazards of the chemicals to which employees will be exposed;

(B) To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;

(C) To conduct pre-assignment or periodic medical sur-

veillance of exposed employees;

(D) To provide medical treatment to exposed employees;

(E) To select or assess appropriate personal protective equipment for exposed employees;

(F) To design or assess engineering controls or other protective measures for exposed employees; and,

(G) To conduct studies to determine the health effects of exposure.

(iii) The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i)(3)(ii) of this section:

(A) The properties and effects of the chemical;

(B) Measures for controlling workers' exposure to the chemical;

(C) Methods of monitoring and analyzing worker exposure to the chemical; and,

(D) Methods of diagnosing and treating harmful exposures to the chemical;

(iv) The request includes a description of the procedures to be used to maintain the confidentiality of the disclosed information; and,

(v) The health professional, and the employer or contractor of the services of the health professional (i.e., downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i)(6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

(4) The confidentiality agreement authorized by paragraph (i)(3)(iv) of this section:

(i) May restrict the use of the information to the health purposes indicated in the written statement of need;

(ii) May provide for appropriate legal remedies in the event of a breach of the agreement, including stipulation of a reasonable pre-estimate of likely damages; and,

(iii) May not include requirements for the posting of a penalty bond.

(5) Nothing in this standard is meant to preclude the parties from pursuing non-contractual remedies to the extent permitted by law.

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) If the chemical manufacturer, importer, or employer denies a written request for disclosure of a specific chemical identity, the denial must:

(i) Be provided to the health professional, employee, or designated representative, within thirty days of the request;

(ii) Be in writing;

(iii) Include evidence to support the claim that the specific chemical identity is a trade secret;

(iv) State the specific reasons why the request is being denied; and,

(v) Explain in detail how alternative information may satisfy the specific medical or occupational health need without revealing the specific chemical identity.

(8) The health professional, employee, or designated representative, whose request for information is denied under paragraph (i)(3) of this section may refer the request

and the written denial of the request to OSHA for consideration.

(9) When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i)(8) of this section, OSHA shall consider the evidence to determine if:

(i) The chemical manufacturer, importer, or employer has supported the claim that the specific chemical identity is a trade secret;

(ii) The health professional, employee, or designated representative, has supported the claim that there is a medical or occupational health need for the information; and

(iii) The health professional, employee, or designated representative, has demonstrated adequate means to protect the confidentiality.

(10)(i) If OSHA determines that the specific chemical identity requested under paragraph (i)(3) of this section is not a *bona fide* trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

(ii) If a chemical manufacturer, importer, or employer demonstrates to OSHA that the execution of a confidentiality agreement would not provide sufficient protection against the potential harm from the unauthorized disclosure of a trade secret specific chemical identity, the Assistant Secretary may issue such orders or impose such additional limitations or conditions upon the disclosure of the requested chemical information as may be appropriate to assure that the occupational health services are provided without an undue risk of harm to the chemical manufacturer, importer, or employer.

(11) If, following the issuance of a citation and any protective orders, the chemical manufacturer, importer, or employer continues to withhold the information, the matter is referrable to the Occupational Safety and Health Review Commission for enforcement of the citation. In accordance with Commission rules, the Administrative Law Judge may review the citation and supporting documentation *in camera* or issue appropriate protective orders.

(12) Notwithstanding the existence of a trade secret claim, a chemical manufacturer, importer, or employer shall, upon request, disclose to the Assistant Secretary any information which this section requires the chemical manufacturer, importer, or employer to make available. Where there is a trade secret claim, such claim shall be made no later than at the time the information is provided to the Assistant Secretary so that suitable determinations of trade secret status can be made and the necessary protections can be implemented.

(13) Nothing in this paragraph shall be construed as requiring the disclosure under any circumstances of process or percentage of mixture information which is trade secret.

(j) *Effective dates.* Employers shall be in compliance with this section within the following time periods:

(1) Chemical manufacturers and importers shall label containers of hazardous chemicals leaving their workplaces, and provide material safety data sheets with initial shipments by November 25, 1985.

(2) Distributors shall be in compliance with all provisions of this section applicable to them by November 25, 1985.

(3) Employers shall be in compliance with all provisions of this section by May 25, 1986, including initial training for all current employees.

§ 7301. Short title

This act shall be known and may be cited as the Worker and Community Right-to-Know Act.

§ 7302. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Article." A manufactured item which is formed to a specific shape or design during manufacture, which has end use functions dependent in whole or in part upon its shape or design during end use and which does not release, or otherwise result in exposure to, a hazardous chemical under normal conditions of use.

"Chemical." Any element, substance, chemical compound or mixture of elements, substances or compounds, but shall not include an article as defined herein, food, drugs or cosmetics as defined in the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.), cosmetics, tobacco or products which are primarily intended for sale on the retail market to the general public and are sealed in the packages to be used therewith.

"Chemical Abstracts Service number." The unique identification number assigned by the Chemical Abstracts Service to chemicals.

"Chemical identification sheet or CIS." A written document, prepared in accordance with the requirements of this act, which contains, in the case of a hazardous mixture, the identity by chemical name, common name and Chemical Abstracts Service number, all special hazardous substances comprising 0.01% or more of the mixture and all hazardous substances comprising 1% or more of the mixture and all other substances comprising 3% or more of the mixture.

"Chemical name." The scientific designation of a chemical in accordance with the nomenclature system developed by the International Union of Pure and Applied Chemis-

try or the Chemical Abstracts Service rules of nomenclature.

"Common name." Any designation or identification other than a chemical name or trade name, by which a substance is generally known, such as a nonsystematic scientific name, which clearly identifies a single chemical or mixture and which is unique to that specific chemical or mixture.

"Container." A receptacle used to hold a liquid, solid or gaseous substance including, but not limited to, bottles, barrels, boxes, cans, cylinders, drums, cartons, vessels, vats and stationary tanks. The term does not include containers into which substances are transferred by the employee from labeled containers and which are intended only for the immediate use by the employee who performs the transfer, or containers which are primarily designed to be sold on the retail market for use by the general public.

"Department." The Department of Labor and Industry.

"Employee." Any person currently working for an employer, except domestic or casual laborers employed at the employer's place of residence. A former employee shall be considered an employee hereunder, except that the former employee's rights hereunder shall be subject to a request made by the former employee and received by the employer.

"Employee representative." An individual or organization authorized by an employee or employees to exercise his or her or their rights to request information under this act. A recognized or certified collective bargaining agent for an employee shall be considered to be an employee representative without regard to individual employee authorization.

"Employer." Any individual, partnership, corporation or association doing business in the Commonwealth, including the Commonwealth, its political subdivisions, including school districts, and any officer, board, commission, agency, authority or other instrumentality thereof.

"Environmental hazard." Any substance, emission or discharge determined by the department to be a hazardous substance and which, because of its particular or extreme properties, poses a danger if released into the environment.

"Exposure." Any situation arising from a workplace operation where an employee may ingest, inhale, absorb through the skin or eyes, or otherwise come into contact with a chemical or mixture.

"Hazardous mixture." Any mixture that contains one or more hazardous substances as defined herein, in a concentration of 1% or greater in the mixture or any mixture that contains one or more special hazardous substances or environmental hazards in concentrations of 0.01% or greater in the mixture. For the purposes of this act, where a special hazardous mixture is combined with one or more chemicals or mixtures to form a new mixture, the new mixture shall be considered to be a hazardous mixture.

"Hazardous substance." Any chemical or mixture defined as hazardous pursuant to section 3. For the purposes of this act, any hazardous mixture is a hazardous substance.

"Hazardous Substance Fact Sheet or HSFS." A written document prepared by the department for the purpose of transmitting information about a hazardous substance to employers, employees or members of the general public.

"Hazard warning." Words, pictures, symbols or a combination of these appearing on a label which conveys information regarding actions or cautions to be taken with regard to the associated hazardous substance.

"Health professional." Any physician, nurse, industrial hygienist, toxicologist or epidemiologist providing medical, occupational health or environmental health services.

"Importer." The first business within the customs territory of the United States which handles chemicals produced in other countries and intended for sale and distribution to purchasers within the United States.

"Label." A sign, emblem, stocker or marker affixed to

or stenciled into a container listing the information required pursuant to section 6.

"Manufacturer." Any individual, partnership, corporation, association or other person who provides, extracts, produces, uses or otherwise makes chemicals for sale or distribution.

"Material Safety Data Sheet or MSDS." A written document prepared by a manufacturer, supplier or importer in conformity with the requirements set forth in section 4 for the purpose of transmitting information concerning a chemical.

"Mixture." A combination of two or more chemicals not involving a chemical reaction.

"NIOSH Registry of Toxic Effects of Chemical Substances." The on-line data base of the National Institute for Occupational Safety and Health Registry of Toxic Effects of Chemical Substances.

"OSHA." The Federal Occupational Safety and Health Administration.

"Research and development laboratory." A specially designated area used primarily for research, development, teaching or testing activity, and not primarily involved in the production of goods for commercial sale, in which chemicals are used by or under the direct supervision of a technically qualified person. For the purpose of this act, a technically qualified person is a person who, because of education, training or experience, understands the risks associated with the hazardous substance or mixture containing a hazardous substance handled by employees under his or her supervsion or guidance.

"Sealed package." A portable container into which the manufacturer, importer or supplier has placed a chemical or chemicals, and which is sealed by said manufacturer, importer or supplier for transport to another location, and which is intended to remain sealed until reaching its final destination. A sealed package shall also include those containers used to transport hazardous wastes in accor-

dance with the Resource Conservation and Recovery Act of 1976 (Public Law 94-580, 43 U.S.C. § 6901 et seq.) or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 96-510, 26 U.S.C. § 4611 et seq. and 42 U.S.C. § 9601 et seq.).

"Special hazardous substance." A hazardous substance so designated by the department because its particular toxicity, tumorigenicity, mutagenicity, reproductive toxicity, flammability, explosiveness, corrosivity or reactivity poses a special hazard to health and safety.

"Supplier." Any individual, partnership, corporation, association or other person, inside or outside the Commonwealth, who manufactures, supplies, imports or distributes any chemical for sale, distribution or use within the Commonwealth.

"Trade name." Any designation or identification such as a code name or number, or a brand name, used by an employer or supplier to identify a chemical other than by its chemical or common name.

"Trade secret." Any formula, plan, pattern, process, production data, information or compilation of information, including chemical or common name, which is known only to an employer and a limited number of other individuals, and which is used in the fabrication and production or development of a product, process or service and which gives the employer possessing it a competitive advantage over businesses who do not possess it, or the secrecy of which is certified by an appropriate official of the Federal Government as necessary for national defense purposes.

"Workplace." Any building or work area or contiguous group of buildings or work areas at one geographical location composing a plant site in the Commonwealth used by the employer on a permanent or temporary basis to conduct business.

"Work area." Any room, section of a room or defined space within a workplace where one or more workers are based for the regular performance of their duties.

§ 7303. Hazardous substance list

(a) *Hazardous substance list.* The department shall, no later than 180 days subsequent to the effective date of this act, compile a list of hazardous substances which shall include, but not be limited to, the substances found in the latest compilation or issue of any one of the following lists:

(1) Federal Environmental Protection Agency (EPA) list of toxic pollutants and hazardous substances prepared pursuant to sections 307 and 311 of the Federal Clean Water Act of 1977 (33 U.S.C. §§ 1317, 1321).

(2) EPA list of hazardous air pollutants prepared pursuant to section 112 of the Federal Clean Air Act (42 U.S.C. § 7412).

(3) EPA list of restricted use pesticides found at 40 CFR 162.30 (relating to optional procedures for classification of pesticide uses by regulation).

(4) EPA Carcinogen Assessment Group's List of Carcinogens.

(5) OSHA list of toxic and hazardous substances found in 29 CFR 1910, subpart Z (relating to toxic and hazardous substances).

(6) International Agency for Research on Cancer sublist, entitled "Substances found to have at least sufficient evidence of carcinogenicity in animals."

(7) National Toxicology Program's list of substances published in their latest Annual Report on Carcinogens.

(8) National Fire Protection Association list found in "Hazardous Chemicals Data (NFPA 49)."

(9) National Fire Protection Association list found in "Fire Hazard Properties of Flammable Liquids, Gases, Volatile Solids (NFPA 325M)," but only those substances found on sublists for health items, categories 2, 3 and 4; sublists for reactivity items, categories 3 and 4; sublists for flammability,

categories 3 and 4.

(10) American Conference of Governmental Industrial Hygienists' list found in Threshold Limit Value for Chemical Substances and Physical Agents in the Workplace.

(11) National Cancer Institute sublist, entitled "Carcinogens bioassays with at least evidence suggestive of carcinogenic effect," but including only those substances which satisfy criteria of the National Toxicology Program indicating significant carcinogenic effect.

The list shall further include any other substance or mixture designated by the department as hazardous because of its known or probable adverse human or environmental effect. This list shall be updated, reduced or expanded by the department as necessary in light of new scientific evidence and knowledge. A copy of the list and any modifications thereof shall be transmitted to every employer subject to this act.

(b) *Additions to hazardous substance list.* Any chemicals which appear on any future compilation or issue of any of the lists contained in subsection (a), shall automatically be added to the hazardous substance list. Prior to adding any other chemicals to the list of hazardous substances enumerated in subsection (a)(1) through (11), the department shall, after giving proper notice, hold hearings on the proposed additions to allow for comment by interested parties. Upon conclusion of the hearings, the department shall, if it determines the propriety of including the chemicals, amend its regulations to reflect additions and publish the additions thereto in the Pennsylvania Bulletin, and notify employers regarding the additions.

(c) *Deletions from hazardous substance list.* Any chemicals which are removed from any future compilation or issue of the lists contained in subsection (a), or any chemicals that have been added to the hazardous substance list under subsection (b), may be deleted from the hazardous sub-

stance list. Prior to deleting any chemical from the hazardous substance list, the department shall, after giving proper notice, hold hearings on the proposed deletions to allow for comment by interested parties. Upon conclusion of the hearings, the department, if it determines the propriety of deleting the chemical, shall amend its regulations to reflect deletions and publish the deletions therefrom in the Pennsylvania Bulletin, and notify employers regarding the deletions.

(d) *Special hazards and environmental hazards.* The department shall designate those hazardous substances which shall be considered special hazardous substances and those which shall be considered environmental hazards. The department shall compile separate lists of the special hazardous substances and the environmental hazards. These lists shall be updated, transmitted to employers and posted by employers in the same manner as the hazardous substance list. The department shall, by regulation, specify those special hazardous substances which, because of their particular or extreme properties, must be identified at concentratons of less than 0.01%.

(e) *Hazardous substance survey form.* Every employer shall, upon a form supplied by the department, fill out a hazardous substance survey for each workplace, providing information on the hazardous substances present during the prior year. A listing of the hazardous substances shall be posted by the employer as required by section 7. Upon the written request of any person in Pennsylvania, the department shall require the employer to forward a copy of the completed survey form to the department within 20 days. The department shall, in turn, keep a copy of the survey form on file, and shall immediately transmit a copy of the form to the original requestor. The employer shall update the hazardous substance survey for each workplace every two years.

(f) *Access of police, fire and emergency response agencies.* Upon the request of a local police, fire or emergency

response agency, within whose jurisdiction an employer falls, an employer shall provide a copy of its latest hazardous substance survey, and, if requested, copies of all relevant Material Safty Data Sheets. The employer shall further provide, upon the request of said agency, all relevant and available information concerning any environmental hazards pertaining to the workplace in question.

(g) *Environmental hazard survey.* Upon the written request of any person in Pennsylvania, the department shall require an employer to complete an environmental hazard survey for a particular workplace upon a form supplied by the department. The environmental survey shall include those substances emitted, discharged or disposed of from that workplace, and shall provide the following information to the extent that such information or reports are made under current provisions of Federal, State, county or municipal law:

(1) The total known or estimated stack or point-source emissions of the substance.

(2) The total estimated fugitive or nonpoint- source emissions of the substance.

(3) The total known or estimated discharge of the substance into the surface or groundwater, the treatment methods and the known or estimated raw wastewater volume and loadings.

(4) The total known or estimated discharge of the substance into publicly owned treatment works.

(5) The known or estimated quantity and methods of disposal of any wastes containing the substance, the method of onsite storage of these wastes, the location or locations of the final disposal sites for these wastes and the identity of the hauler of the wastes.

Within 30 days of the department's request, the employer shall return the completed environmental survey form to the department, which shall in turn keep a copy on file and shall immediately transmit a copy to the original requestor. The employer shall also keep a copy of the environ-

mental hazard survey on file at that workplace and at its principal place of business in the Commonwealth.

(h) *Onsite testing.* Upon the request to the department, and for good cause shown and upon consultation with the interested parties involved, the department may conduct at its expense onsite tesing or use such other methods as will provide more exact information concerning the environmental hazards reported in the environmental hazards survey under subsection (g). The site owner may conduct onsite testing instead of the department. Upon the written request of the employer, the department shall detail in writing the type and methods of testing and provide technical assistance to aid the employer who chooses to conduct testing instead of the department. In an emergency, the department may undertake said testing at the Commonwealth's expense. The department shall not conduct onsite testing which has already been conducted by OSHA.

(i) *Authority to modify filing requirements.* The department may, by regulation, require certain classes or groups of employers to automatically file with the department the completed hazardous substance survey and/or environmental hazard survey every two years, taking into account the nature and quantity of the hazardous substances and/or environmental hazards involved, the likely danger to the surrounding community, the number of employees affected or the importance of said information to future epidemiological or other health studies.

(j) *Retention of materials.* The department shall maintain a file of all completed hazardous substance surveys and environmental hazard surveys for 30 years. The department shall also retain at least one Material Safety Data Sheet for each hazardous substance and hazardous mixture, together with revisions thereof.

§ 7304. Obligation of suppliers

(a) *Labeling.* Every supplier, as a condition of doing business in this Commonwealth, shall insure that the con-

tainer of any chemical which is delivered to a point within this Commonwealth or which is produced within this Commonwealth is clearly labeled in the manner required by section 6.

(b) *Provision of Material Safety Data Sheets.*

(1) All manufacturers, importers or suppliers, as a condition of doing business in this Commonwealth, shall prepare an MSDS for each hazardous substance or hazardous mixture they produce or import, and shall ensure that all purchasers of hazardous substances or hazardous mixtures are provided an appropriate MSDS with their initial shipment, and with the first shipment after an MSDS is updated. The manufacturer, importer or supplier shall further provide an MSDS for any other chemical delivered to a point within the Commonwealth, if the manufacturer, importer or supplier produces or possesses such an MSDS.

(2) Distributors shall ensure that MSDS's are provided to all purchasers of hazardous substances or hazardous mixtures. Manufacturers, importers, suppliers and distributors shall notify the recipient of the hazardous substance or hazardous mixture that such substance is subject to the provisions of this act. In lieu of physically attaching MSDS's to containers shipped, the manufacturer, importer, supplier or distributor may mail the MSDS to the purchaser at the time of the shipment.

(3) Employers shall obtain and maintain MSDS's for each hazardous substance or hazardous mixture in their workplace. If an MSDS is not provided with the shipment, the employer shall obtain one from the manufacturer, importer, supplier or distributor.

(4) Manufacturers, importers or suppliers shall ensure that one copy of an MSDS for each hazardous substance or hazardous mixture which they produce within or deliver to a point within this Common-

wealth shall be mailed to the department at the same time as their initial shipment to an employer within this Commonwealth. In addition, the manufacturer, importer or supplier shall mail to the department one copy of a MSDS for any other chemical for which they produce or possess an MSDS, at the time of the initial shipment of the chemical to an employer within this Commonwealth. An additional submission of an MSDS shall be made at the time of the first shipment to an employer within this Commonwealth after an MSDS is updated. In this manner, or upon its own initiative, the department shall compile a complete file of all MSDS's for each hazardous substance, hazardous mixture and appropriate chemical that is produced or distributed within this Commonwealth, and shall keep the complete MSDS file updated as new information becomes available.

(c) *Contents of Material Safety Data Sheets.* The information in the Material Safety Data Sheets shall reflect the contents of the relevant National Library of Medicine computer files and the latest edition of the National Fire Association's Fire Protection Guide on Hazardous Materials. Subject to the trade secret provisions of section 11, it shall also include, but not be limited to, the following information:

(1) The chemical name, the Chemical Abstracts Service number, the trade name, common names and any other names under which said substance is regulated by another State or Federal agency.

(2) The chemical name, common name and Chemical Abstracts Service number of every chemical contained in the substance which comprises 3% or more of the substance except that hazardous substances shall be listed if they comprise 1% or more of the substance, and all special hazardous substances which comprise 0.01% or more of the substance shall be listed.

(3) A reference to all relevant information on the hazardous substance from the NIOSH Registry of Toxic Effects of Chemical Substances.

(4) The boiling point, vapor pressure, vapor density, solubility in water, specific gravity, melting point, physical state, color and odorous properties at standard conditions of temperature and pressure.

(5) The flash point, auto ignition temperature, percentage of volume of flammable limits, the recommended fire extinguishing media, any special firefighting procedure and any other unusual fire or explosion hazards.

(6) The hazards, if any, posed by the substance, including its toxicity, tumorigenicity, mutagenicity, reproductive toxicity, flammability, explosiveness, corrosivity and reactivity, including specific information on its reactivity with water.

(7) A description, in nontechnical language, of the acute and chronic health effects of exposure to the substance, including the signs and symptoms of exposure, and medical conditions which are generally recognized as being aggravated by exposure to the substance.

(8) The permissible exposure level, threshold limit value, short-term, ceiling and other established limit values as set by OSHA, National Institute of Occupational Safety and Health, American Industrial Hygiene Association and American Conference of Governmental Industrial Hygienists.

(9) The potential routes and symptoms of exposure to the hazardous substances.

(10) Emergency first aid procedures in case of inhalation, swallowing, eye splashes and skin contamination, including a telephone number to be called day or night in an emergency and any special information needed by medical practitioners treating persons.

(11) The appropriate emergency and first aid proce-

dures for spills, fires, potential explosions and accidental or unplanned emissions involving the hazardous substance.

(12) Recommended waste disposal method if applicable.

(13) Personal protective equipment to be worn or used when handling or otherwise coming in contact with the substance and any special precautions, recommended engineering controls or work practices to be used in handling the substance.

(14) A description of the extent of testing performed on the substance.

(15) A description of the known synergistic or additive effects reasonably anticipated by exposure to this substance and to other substances over the same period of time.

(16) For mixtures, a description of any known dangers or hazards created by the mixture that are greater than and would not be otherwise disclosed by the Hazardous Substance Fact Sheets for the constituent chemical substances.

(17) The name, address and telephone number of the manufacturer of the chemical.

(18) Date of preparation or last revision of the sheet.

Notwithstanding the above, any MSDS which contains the information requested in paragraphs (1) and (2), and which otherwise contains the information required by 29 CFR § 1900.1200(g)(2), as of November 25, 1983, shall be considered to have met the requirements of this section.

(d) *Chemical identification sheet.* An employer or supplier may, for convenience, provide the information requested in subsection (c)(2) by affixing a chemical identification sheet containing said information to an already existing MSDS and it shall be considered an integral part of the MSDS.

(e) *Similar substances.* Where hazardous mixtures have

similar contents and hazards, but vary in specific composition, the supplier or employer may prepare one Material Safety Data Sheet to apply to all of the similar mixtures: Provided, That the Material Safety Data Sheet identifies all the various mixtures by the names to which it applies, is correct in all respects and correctly states the constituent chemicals in all of the mixtures. It is not necessary to produce a new MSDS when a hazardous substance is diluted with water.

(f) *No duty to test.* This section shall not be construed to mean that an employer or supplier must conduct studies to develop new information.

(g) *Agricultural mixtures.* When a farm supplier combines one or more chemicals for agricultural use, the farm supplier may substitute all Material Safety Data Sheets for the ingredients in the mixture in lieu of preparing a new MSDS.

§ 7305. Availability of information

(a) *Dissemination to local agencies.* The department shall ensure that each of its regional offices makes available to the public the MSDS's and other information required under this act. The department shall further make immediately available any MSDS's and any completed hazardous substance or environmental hazard surveys for a particular county to the appropriate local police, fire or other emergency response agency, upon said agency's request, if the same has not already been obtained.

(b) *New information.* Whenever a supplier receives or discovers any relevant new information regarding a hazardous substance, the supplier shall make such information available to the department and to all employers to which the supplier provides said substance. The employer shall, in turn, make such information available to employees and the employees' representatives, upon receipt of such new information.

(c) *Copy of data available to employees.* An employer shall furnish, upon the request of an employee or employee representative, any of the following:

(1) Any of the lists or survey forms generated under section 3.

(2) Any Material Safety Data Sheet for any hazardous substance or hazardous mixture present in any of the employer's workplaces.

d) *Furnishing information.* Upon the written request of an employee or employee representative, the employer shall furnish a copy of the requested MSDS or the HSFS to said employee within five days of receipt of the written request. If the requested MSDS or HSFS is in the possession of the employer and the employer fails to give said information to the employee or employee representative within five days, the employee shall have the right to refuse to work with the specific hazardous substance without penalty to said employee until such time as the information requested is provided. If the requested information is not in the possession of the employer, the employer shall notify, in writing, said employee within five days of the receipt of the employee's written request that the information is not in the employer's possession. Within 15 days of the employer's written notification to the employee, the employer shall attempt to obtain the requested information from the supplier and the department and shall document such attempts. Upon receipt of the employer's request, the department shall immediately attempt to obtain the requested information from the supplier and notify the employer of that attempt. If, at the end of the 15-day period, the supplier does not respond to the employer's and the department's request, the employer and the department shall give to the employee all hazardous substance information required by this act in the employer's or department's possession. The employee shall have the right to refuse to work without penalty until the requested information is furnished unless the employer and the depart-

ment have taken all actions prescribed by this section. Reassignment of an employee to other work, at equal pay and benefits, shall not be considered a penalty under this subsection.

(e) *Information in the work area.* Every employer shall make readily available, in every work area, the Material Safety Data Sheet for every hazardous substance or hazardous mixture to which the employees working in said work area may be exposed. The Material Safety Data Sheets shall be made available in such a manner and in such numbers as to give every employee in that work area easy and unhindered access to the Material Safety Data Sheets without permission or intervention of management or any supervisor.

(f) *Limitation on fees.* All Material Safety Data Sheets, educational and other materials shall be furnished by an employer to an employee or employee representative at no cost to the employee or employee representative. If the employee making the request has requested and received the same information about the same substance within the preceding 12 months, the employer may impose a reasonable charge, not to exceed the costs of reproduction, for that information. No fee shall be charged if that employee's job assignment has changed or there is new information available concerning any of the subjects about which information is required to be provided. In no event shall the employer charge fees pursuant to requests by a certified or recognized bargaining agent.

(g) *Public access.* Any person living or working in Pennsylvania and who is not a competitor may request from the department a copy of the lists or forms required in section 3 which are present in a particular workplace, and any Material Safety Data Sheet or Hazardous Substance Fact Sheet on file and the department shall transmit the requested material within 45 days. Any request shall be treated by the department as confidential as to the name and address of the requestor. The department shall also

make materials for its respective regions immediately available during business hours from its regional offices. Materials shall be available at a fee not to exceed the cost of reproducing them.

§ 7306. Labeling

(a) *Labeling of container.*

(1) The employer shall ensure that each container of a hazardous substance is labeled, tagged or marked with the chemical name or common name, a hazard warning as provided in subsection (f), and the name, address and telephone number of the manufacturer of the substance.

(2) The employer shall ensure that each container of a hazardous mixture is labeled, tagged or marked with the common name of the mixture where one exists, or the trade name of the mixture if no common name exists, the chemical or common name of all special hazardous substances comprising 0.01% or more of the mixture, the chemical or common name of all hazardous substances constituting 1% or more of the mixture, a hazard warning as provided in subsection (f), and the name, address and telephone number of the manufacturer of the substance.

(3) The employer shall ensure that each container of a single chemical is labeled, tagged or marked with the chemical name or common name, a hazard warning as provided in subsection (f), if appropriate, and the name, address and telephone number of the manufacturer of the chemical.

(4) The employer shall ensure that each container of a mixture is labeled, tagged or marked with the common name of the mixture where one exists, or the trade name of the mixture if no common name exists, a hazard warning as provided in subsection (f), if appropriate, and the name, address and telephone number of the manufacturer. In addition, the employer

shall ensure that either the top five substances by volume or those substances constituting 5% or more of the mixture, be labeled by chemical name or common name.

(5) The employer is not required to label any container into which a chemical or mixture is transferred by the employee from labeled containers and which is intended only for the immediate use by the employee who performs the transfer.

(6) The employer shall ensure that each container of hazardous substances, hazardous mixtures or chemicals leaving the workplace is labeled, tagged or marked with the appropriate information as required in paragraph (1), (2),(3) or (4).

(7) The employer may call upon the manufacturer or supplier for assistance in labeling.

The employer shall ensure that each label is prominently affixed to the container or the piping system and displayed in such a manner that employees can easily identify the chemical in that container. These labeling requirements may be altered only in accordance with subsections (b), (d) and (f) or section 11. The employer shall not remove or deface existing labels on incoming containers of chemicals unless the container is immediately relabeled with the required information. The employer need not affix new labels to comply with this section if existing labels already convey the required information that the chemical or common name on the container is the same as that listed on the MSDS and can be used by the employee as a cross-reference to the MSDS. Any label may contain other information, including trade or brand name, provided the information required by this section is clearly legible. Nothing in this section shall require an employer to test any chemical to determine the accuracy of the label.

(b) *Common name usage.* A common name or trade name may be used for the purpose of subsection (a)(1), (2), (3) and (4), only if the use of such name more easily or readily iden-

tifies the true nature of a chemical or mixture. Where a chemical name or Chemical Abstracts Service number exists, but the container is not labeled with either, an employee shall have the right to request, in writing, the chemical name or Chemical Abstracts Service number of the substance, and the employer shall have five working days to give the required information to said employee, if a chemical name or Chemical Abstracts Service number is in the possession of the employer. If no chemical name or Chemical Abstracts Service number is in the possession of the employer, the employer shall notify the requesting employee, in writing, within five working days of the initial employee request and the employee shall have the right to request the department to supply said chemical name or Chemical Abstracts Service number.

(c) *Pipelines.* The content of a pipeline system shall be identified by labels applied at or near all ports. As used in this subsection, "ports" shall mean a point of access, which may be opened to the environment, used for charging or discharging a system, at which an employee may come into direct contact with a chemical under normal conditions of use. In those cases in which a pipeline is used to convey different chemicals at different times, and in the case of an environmental health and pest control system or other system designed to automatically discharge a chemical from spray-type ports, the employer may develop alternative methods to adequately apprise anyone who may be potentially exposed at any port of the contents of the pipeline. The requirements of this subsection shall not be applicable to effluents, water discharges or emissions through stacks, discharge conduits or to fire sprinkler systems containing only water.

(d) *Display of label.* The employer shall ensure that each label, sign, placard or other operating instructions required by this section is legible and prominently affixed in and displayed to the container or port in such a manner that employees can easily identify the substance or mixture

present herein. The employer may use signs, placards, operating procedures or other such printed materials as alternatives to individual labels on stationary equipment, agricultural implements, and portable or mobile machinery used in outdoor or temporary worksites, as long as the alternative used indicates the appropriate chemical or common name and hazard warnings and is readily available to employees.

(e) *Cross-reference to MSDS.* The employer shall ensure that the chemical or common name used on the container to identify a hazardous substance or mixture is the same as the chemical or common name used on the MSDS or Hazardous Substance Fact Sheet, if that is the information available for the hazardous substance or mixture, and that the MSDS or Hazardous Substance Fact Sheet is readily available to the employee in his work area.

(f) *Hazard warnings.* Each employer shall ensure that container labels provide a warning as to the specific nature of hazard arising from the substance in the container. The hazard warnings shall be given in conformity with one of the nationally recognized and accepted systems of providing such warnings and shall be consistent throughout the workplace.

(g) *Exemptions.* When containers are labeled as required under applicable Federal laws and regulations, this section does not require labeling of containers which contain:

(1) Any pesticides as such terms are defined in the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 135 et seq.).

(2) Any food, drug or cosmetic as such terms are defined in the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.).

(3) Any distilled spirits (beverage alcohols), wine or malt beverage intended for nonindustrial use, as such terms are defined in the Federal Alcohol Administration Act (27 U.S.C. § 201 et seq.).

(4) Hazardous waste from spills and disposal site rehabilitation projects handled pursuant to the Resource Conservation and Recovery Act of 1976 (Public Law 94-580, 42 U.S.C. § 6901 et seq.) or the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 96-510, 26 U.S.C. § 4611 et seq. and 42 U.S.C. § 9601 et seq.).

§ 7307. Notice

(a) *Workplace postings.* Every employer shall prominently post in every workplace, in a location or locations where notices to employees are normally posted:

(1) Lists of all hazardous substances and special hazardous substances found in that workplace and all environmental hazards emitted or discharged therefrom. In addition, upon request, an employer shall furnish to an employee, a list of the hazardous substances used or produced in that employee's work area. A new or newly assigned employee shall be offered a list when assigned to a work area. Such lists shall be updated as necessary but at least annually.

(2) Notification to employees and their representatives of their rights under this act.

(3) All other notices required by the department to be posted.

(b) *Outdoor and temporary worksites.* In the case of outdoor or temporary worksites which are not contiguous to a building regularly used by the employer as a workplace, all postings of notices, Material Safety Data Sheets and other materials shall be in a location where employees, during a course of a normal day of work, have access which does not depend on the permission or intervention of management or any supervisor.

§ 7308. Employer educational program

(a) *Requirement.* Every employer shall provide at a minimum an annual education and training program for employees exposed to hazardous substances or hazardous

mixtures with respect to the hazardous substance or mixture found in their normal work area. Additional instruction shall be provided whenever the potential for exposure to the hazardous substance is altered or whenever new and significant information is received by the employer concerning the hazards of the substance or mixture.

(b) *Content of program.* Employers shall furnish employees who are using or handling hazardous substances or hazardous mixtures with information on the contents of a Material Safety Data Sheet, label or equivalent information either in written form or through training programs which may be generic to the extent appropriate and related to the job. Content of the program shall include, as appropriate, the following information concerning the hazardous substances or hazardous mixtures:

(1) The location.

(2) The properties.

(3) The chemical and common name.

(4) The acute and chronic effects.

(5) The symptoms arising from exposure.

(6) The potential for flammabililty, explosivity and reactivity.

(7) Appropriate emergency treatment.

(8) Appropriate personal protective equipment and proper conditions for safe use.

(9) Emergency procedures for spills, leaks, fires, pipeline breakdowns or other accidents.

(c) *Education and training assistance program.* As part of its outreach program, the department shall develop and maintain an education and training assistance program to aid employers who, because of size or other practical considerations, are unable to develop such programs by themselves. Such a program would be available to the employer on request.

§ 7309. Health and exposure records

(a) *General rule.* Upon request by the department, employers shall provide copies of employee health and exposure records maintained by the employer, including, but not limited to, those records maintained and supplied to the Federal Government by employers as mandated under applicable State and Federal statutes and regulations except as access by third parties is limited by said statutes and regulations.

(b) *Certain information confidential.* The department shall not release any information in a way that identifies individuals. The department may, however, publish analysis of reports and information for scientific and public health purposes if the identities of the individuals concerned cannot be ascertained and if information protected by applicable trade secret law is not divulged.

(c) *Records retention requirement.* The department shall require an employer to keep records of his employees' exposure to specific chemical substances to the extent that such are required under 29 CFR 1910.20(g) (relating to employee information).

(d) *Employee access.* Employees under this act shall have the right of access to exposure and medical records in the manner set forth by OSHA pursuant to 29 CFR 1910.20 (relating to access to employee exposure and medical records), as effective August 21, 1980.

§ 7310. Outreach programs

(a) *Duty of the department.* The department shall develop and implement outreach programs to inform employees and the general public of their respective rights under this act and to educate and inform employers, employees and the public, concerning hazardous and other dangerous substances including, but not limited to, their dangers, their proper handling and disposal and emergency treatment. The department shall prepare this information in a clear and concise manner using words with common and every-

day meanings. The department shall also ensure that all written materials are available in Spanish, including departmental notices, Hazardous Substance Fact Sheets and education and public information materials.

(b) *Contracts with other agencies to develop programs.* The department may contract with public and private organizations to develop and implement the outreach and employee education programs established pursuant to this act.

(c) *Public information.* As part of the outreach programs, the department shall develop and maintain a supply of informational leaflets in public buildings, including employment services, offices of the Office of Employment Security, institutions and facilities under the supervision or control of the department, hospitals, union halls, community centers, schools and local agencies providing services to employers and employees. The department shall mail these leaflets to employers and shall periodically distribute public service announcements to newspapers and television and radio stations throughout the Commonwealth to further the goals of the outreach program.

(d) *Hazardous Substance Fact Sheets.* The department may produce and disseminate to the public a Hazardous Substance Fact Sheet for any hazardous substance. The categories of information contained therein shall include, but not be limited to, the information contained in a Material Safety Data Sheet. The department may require employers to supply the Hazardous Substance Fact Sheet to requesting employees instead of the supplier's Material Safety Data Sheet.

§ 7311. Trade secrets

(a) *Trade secret claims.* Any importer, employer, manufacturer or supplier may withhold the chemical name or other specific identification of a chemical as a trade secret, provided that:

(1) The claim that the information withheld is a

trade secret can be supported by the person making the claim.

(2) The Material Safety Data Sheet discloses the information concerning the properties and effects of the chemical, if said chemical is a hazardous substance or mixture.

(3) The label and Material Safety Data Sheet indicates that the specific chemical identity is being withheld as a trade secret and specifically notes that a trade secret for a special hazardous substance is being claimed.

(4) The specific chemical identity is made available to health professionals in accordance with this section.

(5) The person making the claim files a notice of said claim with the department. Said notice shall not require the person making the claim to disclose the information which is claimed to be a trade secret.

(b) *Disclosure to treating physicians and nurses.* Notwithstanding any other provision of this act, an employer, manufacturer, importer or supplier shall disclose the chemical identification or other information claimed as a trade secret to a treating physician or nurse when such information is needed for medical diagnosis or treatment of an exposed person. The employer, manufacturer, importer or supplier may require the physician or nurse to sign a confidentiality agreement before disclosing the trade secret. In the case of a medical emergency, the employer, manufacturer, importer or supplier shall first disclose the trade secret to the treating physician or nurse but may later require a confidentiality agreement when circumstances permit.

(c) *Disclosure to other health professionals.* Upon the request of a health professional who is not a treating physician or nurse, an employer, supplier, manufacturer or importer shall disclose information which is claimed as a trade secret under the same conditions and subject to the

same requirements as contained in the OSHA Hazard Communication Standard, 29 CFR Sec. 1900.1200(i)(3), (4) and (7). A health professional who is denied such information under this section may file a complaint or charge with the department. If the department concludes that the information is not a *bona fide trade secret,* or that it is a trade secret but the requesting health professional has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement and has shown adequate means to protect the confidentiality of the information, the department may find the employer, supplier, manufacturer or importer in violation of this act and order them to disclose the requested information to the health professional.

(d) *Confidentiality agreement restrictions.* The confidentiality agreement authorized by subsection (b) may restrict the use of the information to providing medical or other occupational health services to the exposed person, prohibit disclosure of the information to anyone who has not entered into a similar agreement with the consent of the person claiming the trade secret and provide for appropriate legal remedies in the event of a breach of the agreement. No confidentiality agreement shall include requirements for the posting of a penalty bond.

(e) *Request for review of trade secret claims.* Any aggrieved person or employee representative may request the department to review trade secret claims made hereunder. Provided, That any appeal from the decision of the department shall not give said person the right of access to any information considered confidential in subsection (f)(2).

(f) *Review of trade secret claims.* Upon request by any aggrieved person or employee representative, or upon its own initiative, the department shall review trade secret claims as provided herein:

(1) Within 30 days of receipt of a request for review of a trade secret claim, the department shall notify

the person making the claim and require the person to file an application and supporting evidence. All proceedings shall be in conformity with Title 1 of the Pennsylvania Code (relating to general provisions). If the department finds that the information in question is not a trade secret as defined by this act, it shall order disclosure of the information. Such order shall be a final adjudication appealable to the Commonwealth Court. Any appeal shall act as a stay to any order of the department or any court which requires disclosure.

(2) All trade secret applications, pleadings, hearing transcripts, documents and other records filed with the department or any court pursuant to a review of trade secret claims or appeals thereof shall be confidential and shall not be disclosed to the public. The notice of claim filed with the department and any petition for review or other pleading filed with the courts which do not reveal either the trade secret or any information claimed as confidential shall be considered as public records. All records that reveal either the trade secret or any information claimed as confidential shall be sealed and held as confidential by the department or, upon request, returned to the employer, supplier, manufacturer or importer at the close of all proceedings hereunder. All hearings provided for under this section shall be closed to all persons except the employer, supplier, manufacturer or importer and the department.

(g) *Penalty.* Any officer or employee of the Commonwealth, contractor to the Commonwealth, physician or employee of a county health department, local fire department or local police department who has access to any confidential information and who willingly or knowingly discloses the confidential information to any person not authorized to receive it, shall, upon conviction thereof, be guilty of a misdemeanor of the third degree. The person or institu-

tion which discloses the confidential information is liable for damages to the full extent of those damages. Violation of this section shall be prima facie evidence of trespass under Pennsylvania common law.

(h) *Protection of confidential information.* Information certified to by appropriate officials of the Federal Government as "necessarily kept secret" for national defense purposes shall be accorded the full protection against disclosure as specified by such official or in accordance with Federal law.

§ 7312. Risk to public health

If the department determines that any hazardous substance or other chemical poses a potential health risk to the general public in an area surrounding the workplace, it shall inform the nearest public health agency, hospital and fire company and shall submit to them copies of each relevant Material Safety Data Sheet or Hazardous Substance Fact Sheet.

§ 7313. Protection of employees

(a) *General rule.* No employer shall discharge or cause to be discharged, or otherwise discipline or in any manner discriminate against, an employee because the employee has filed a complaint, has assisted the department with respect to an inspection under section 14, has instituted or caused to be instituted any proceeding under or related to this act, has testified or is about to testify in any proceeding, has requested any information or properly refused work under section 5 or has exercised any right afforded pursuant to the provisions of this act.

(b) *Burden of proof.* If the department or the employee establishes that within the six months prior to the alleged violation the employee exercised any right provided in this act, the employer shall have the burden to show just cause for his action by clear and convincing evidence.

(c) *Waivers invalid.* Any waiver by an employee or applicant for employment of the benefits or requirements of

this act shall be against public policy and shall be null and void. Any employer's request or requirement that an employee waive any rights under this act as a condition of employment shall constitute a violation.

§ 7314. Complaints and investigations

(a) *Procedure.* The department is hereby empowered to prevent any violations of this act. All proceedings under this section will be scheduled and decisions rendered with all deliberate speed in the interests of protecting employees and members of the public from the dangers of chemical substances. Any person who believes there is a violation by an employer or supplier of this act or any part thereof may file a complaint, within 180 days of the violation, with the department. The complaint shall be in writing, verified, and shall set forth the grounds for the complaint. Upon request of the complainant, his or her identity shall not be revealed. Within 30 days after receipt of the complaint, the department shall so notify the respondent in writing and permit the respondent to demonstrate compliance with this act. If such compliance has not been demonstrated by clear and convincing evidence to the department within 14 days of the mailing of the notification, and if the facts in controversy are susceptible to verification by inspection, an employee of the department shall inspect, at reasonable times, the employer's workplace and all conditions relevant to the complaint and shall, in reasonable manner, make any additional investigation deemed necessary for the full and effective determination of the employer's or supplier's compliance with this act. Whenever the representative of the department proceeding under this section is denied admission to any place of employment, he may obtain a warrant to make an inspection or investigation of the place of employment from the appropriate judicial authority upon a showing of the following:

(1) That the individual seeking the warrant is a duly authorized agent of the department.

(2) That such individual has established under oath or affirmation that the place of employment to be investigated in accordance with this section is to be inspected to determine compliance or noncompliance with the requirements of this act.

(b) *Prerefusal warrant.* Upon application to the appropriate judicial authority and for good cause shown, the department may seek and obtain an inspection warrant prior to the 14-day period set forth in subsection (a) and prior to any refusal by respondent to voluntarily admit a representative of the department.

(c) *Issuance and content of order.* If, upon inspection or investigation of a complaint, the department finds that a respondent has violated any requirements of this act, it shall within seven days issue to the respondent an order to comply. This order shall be in writing and shall specifically describe the nature of the violation and shall state a reasonable time period, not to exceed 90 days, within which the violation must be corrected by the employer.

(d) *Civil penalties.* The department shall have authority to assess any civil penalties from $500 to $10,000 for each violation of this act, unless a greater amount is specified elsewhere in this act, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the respondent and the history of previous violations. If the violation has not been corrected within the time period, the department may levy a further civil penalty of not more than $5,000 per day for each violation. Civil penalties due under this act shall be paid to the department for deposit into the State Treasury and may be collected by the department in a civil action brought in the appropriate court of common pleas. The penalties collected shall be used to defray the costs of the administration and enforcement of this act.

(e) *Hearings.* The respondent may, in writing, request the department to provide a hearing concerning any orders

to comply or penalties levied upon the employer under this section within 30 days of the respondent's receipt of notice thereof. The hearing shall be afforded in accordance with Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure). After the hearing, the department shall affirm, reverse or modify its original determination.

(f) *Preliminary relief.* Where the department determines that reasonable cause exists to believe a violation has occurred, and that said violation may present an imminent danger to any employee or member of the public, the department shall seek a preliminary or special injunction in the appropriate court of common pleas. The courts of common pleas are hereby empowered to and shall issue said injunctive relief upon a prima facie showing by the department of a violation and a showing by a preponderance of the evidence that an imminent danger situation is present.

(g) *Interference with inspection.* Any employer or individual who willfully obstructs or impedes an authorized representative of the department from carrying out an investigation or inspection pursuant to this act or who refuses entry to an authorized representative of the department to any workplace where such inspection is authorized by a warrant shall be assessed a civil penalty of not more than $1,000. Any person who gives advance notice of any inspection to be conducted under this act, without authority from the department, shall be assessed a civil penalty of not more than $1,000.

§ 7315. Judicial review and enforcement

(a) *Appellate review.* Any person or persons aggrieved by a final determination of the department pursuant to sections 11 and 14 may file a petition for review within 30 days of said determination in the Commonwealth Court pursuant to 42 Pa.C.S. § 763(a)(relating to direct appeals from government agencies). The decision of the department shall not be reversed or modified unless said decision is

found to be arbitrary, capricious, illegal or not supported by substantial evidence.

(b) *Original action.* Any aggrieved person may bring a civil action in the appropriate court of common pleas on his own behalf against any employer or supplier for a violation of any provision of this act, except section 11, or any rule promulgated thereto, or may bring suit in the Commonwealth Court against the department for failure to enforce the provisions of this act or any rule promulgated pursuant thereto. Where the action involves the rights of more than one employee, any certified or recognized collective bargaining representative shall have standing to sue on behalf of said employees. The court may issue, whenever it deems appropriate, a preliminary, permanent or special injunction. Under no circumstances may this act be read to require, and under no circumstances may a court award, compensatory and liquidated damages, costs and expenses of litigation, including expert witness fees and reasonable attorney fees.

§ 7316. False statements and intentional omissions

Any person who knowingly makes a false statement, representation or certification in any list, record or other document required to be maintained pursuant to this act or who intentionally or deliberately refrains from complying with this act shall be assessed a civil penalty of not more than $10,000, or shall be guilty of a criminal offense classed as a misdemeanor of the first degree, or both. Any employer or supplier who willfully or recklessly prepares a Material Safety Data Sheet for the purpose of withholding or falsifying relevant information concerning the nature and severity of the hazardous nature of the substance shall be assessed a civil penalty of not more than $10,000 or shall be guilty of a criminal offense classed as a misdemeanor of the first degree, or both.

§ 7317. Rules and regulations

The department shall, in the manner provided by law,

promulgate such rules and regulations and provide such forms and written materials as are necessary to carry out the provisions of this act.

§ 7318. Special applications

(a) *Exemptions.* Notwithstanding any language to the contrary, the provisions of this act shall not apply to the following:

(1) An article.

(2) Products intended for personal consumption by employees in the workplace.

(3) Consumer products packaged in containers which are primarily designed for distribution to, and use by, the general public.

(4) Foods, drugs and cosmetics as defined in the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.).

(b) *Research and development laboratory.* A research and development laboratory as defined in this act shall not be required to comply with sections 3, 4, 5(b) and (g), 6 and 7(a)(1). In addition, said research and development laboratory shall not be required to develop new Material Safety Data Sheets for new or experimental chemicals created in the laboratory, but shall make available Material Safety Data Sheets for chemicals otherwise acquired from manufacturers, suppliers and importers.

(c) *Handling sealed packages.* An employer which stores, warehouses or transports sealed packages, and which is not the manufacturer, supplier or importer of the chemical or chemicals contained therein, shall not be required to comply with sections 3(e) and (g), 5(e), 6 and 7 with respect to sealed packages, provided the seals remain intact while the packages are in the employer's possession and control, and said employer subsequently transfers possession and control of said sealed packages to another person within 20 days. A sealed package may be opened to examine the contents for emergency or safety reasons, and

Federal authorities may open the sealed package for examination.

(d) *Employers without employees.* An employer shall not be required to comply with the requirements of sections 3(e), 5(e), 6(a)(1) through (5), 6(b) through (g), 7 and 8 for any period of time during which the employer does not have any present employees.

(e) *Protection of proprietary information.* Nothing in this act shall be construed as requiring the disclosure of process or percentage of mixture information which is a trade secret.

§ 7319. Construction of act

(a) *No release from liability.* Nothing in this act shall in any way relieve an employer or supplier from liability with regard to the health and safety of an employee or other persons exposed to any substances, nor shall it relieve an employer or supplier from any other duty or responsibility under any other provision of law.

(b) *Construction with Federal law.* This act is to be read in conjunction with any provision of Federal law providing for the identification, labeling or providing of information concerning hazardous substances and is intended to supplement such Federal regulation in the interests of protecting the health and safety of citizens of the Commonwealth.

(c) *Local ordinances.* This act shall preempt and supersede any local ordinance or rule concerning the subject matter of this act.

(d) *Review of preemption.* Should Federal Government preemption be finally adjudicated and result in lessening the burden on any employer to meet the requirements of this act, it is the intent that the General Assembly reexamine this act so that all employers hereunder shall be reexamined as to requirements necessary in meeting the standards of this act so as to treat all employers fairly and equitably.

§ 7320. Severability

The provisions of this act are severable. If any provision of this act or its application to any person or circumstance held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application.

Supreme Court, U.S.
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No. 86-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, *et al.*,
Petitioners,

v.

JAMES W. KNEPPER, JR., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Third Circuit correctly determined that the hazard communication standard promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 to protect manufacturing-sector employees does not preempt provisions of Pennsylvania's Right-to-Know Act calculated to protect the public at large—including consumers—and emergency-response personnel (police, firefighters, doctors, etc.).

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BRIEF IN OPPOSITION

For the reasons stated herein, respondents believe that petitioners' request for a writ of certiorari should be denied.

STATEMENT OF THE CASE AND THE DECISION BELOW

The hazard communication standard was issued by the Occupational Safety and Health Administration ("OSHA") in 1983 under the Occupational Safety and Health Act of 1970 ("OSH Act") to protect "employees in the manufacturing sector." (Pet. App. E-1). The obligations the standard imposes apply only to employers in that sector. (*Ibid.*). The standard requires that those

employers educate workers in the manufacturing sector about hazardous substances produced or used in the workplace, through labeling, the provision of informational materials, and regular training. (Pet. App. E-9—E-18).

Pennsylvania's Right-to-Know Act, promulgated one year after OSHA issued its hazard communication standard, applies essentially to all individuals, partnerships, corporations, or associations doing business in the Commonwealth, including the Commonwealth and its instrumentalities. (Pet. App. F-2—F-5 defining "employer," "importer," "manufacturer," and "supplier"). The Pennsylvania statute—as further described below—establishes requirements and procedures designed to ensure that the *public at large* may obtain basic information about hazardous substances found within the Commonwealth. The statute also imposes certain obligations upon employers specifically designed to supplement the protections afforded to workers by OSHA's hazard communication standard.

The controversy before the Third Circuit focused upon Pennsylvania's regulation of producers and users of hazardous substances within the manufacturing sector.[1] In this regard, the Third Circuit held that OSHA's standard *does* preempt application in the manufacturing sector of those requirements of the Pennsylvania statute *specifically designed to supplement worker protections, viz.*, work-

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[1] Because OSHA's standard applies expressly only to the manufacturing sector, the district court had held that the standard does not preempt state regulation of employers outside that sector even for the purpose of protecting non-manufacturing *employees*. Petitioners contended before the Third Circuit that the standard preempts Pennsylvania's regulation of even business *outside* the manufacturing sector to the extent that Pennsylvania law requires the labeling of containers of hazardous substances and the provision of material safety data sheets (identifying the hazardous properties of such substances) to purchasers. (Pet. App. A-8). As developed more fully in text, the Third Circuit sustained these requirements as applied to *all* sectors because the provisions are an integral part of Pennsylvania's program to protect *public* safety and health generally.

place posting (Pet. App. A-17), workplace display labeling (*id.* A-21), furnishing of hazard information to employees (*id.* A-24), providing access to such information in the workplace (*id.* A-24), and education and training of employees with respect to workplace hazards (*id.* A-25).

The Third Circuit held, however, that the federal standard does *not* preempt state requirements applicable to the manufacturing sector calculated to protect the *public at large*. These requirements, now at issue before this Court, are designed to enable the identification of hazardous substances found within the Commonwealth, the development of basic information about those substances, and the dissemination of this information to consumers, to the public at large—through the Pennsylvania Department of Labor and Industry ("the Department")—and to emergency-response agencies (*e.g.*, police and fire departments) whose members must enter premises to prevent or contain emergencies that may involve hazardous substances.

In this connection, under the Pennsylvania statute, regulated industries must (1) label all hazardous-substance containers (Pet. App. A-18); (2) prepare material safety data sheets for all hazardous substances sold, identifying the substances and describing their hazardous properties (*id.* A-21); (3) furnish these sheets to purchasers and police, fire, or other emergency-response agencies (*id.* A-24); and (4) annually complete and—on request only—submit to the Department and state emergency-response agencies "hazardous substance surveys" about substances on the premises (*id.* A-11). The statute requires the Department to make the information so acquired available to interested members of the public, upon request, and to develop educational programs that will inform the public about hazardous substances used in the Commonwealth and about the rights of the public under the statute. (*Id.* A-12, A-25).

ARGUMENT

The principles that govern this case are well established. Those principles were properly applied by the Court of Appeals to the question presented here, and there is no conflict in the circuits. The petition for a writ of certiorari should therefore be denied.

1. This Court has repeatedly emphasized that preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, —— U.S. ——, 105 S.Ct. 2371, 2376 (1985) and cases cited. In cases such as this, the proponent of preemption must "present a showing . . . that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Id.* "[T]he proper approach is to reconcile 'the operation of both [federal and state] statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976) and cases cited.

2. The Third Circuit correctly applied these principles in the circumstances of this case, in refusing to strike down, on preemption grounds, those requirements of the Pennsylvania Act calculated to promote *public* health and safety. Those requirements fall directly within the historic police powers of the states. *Hillsborough County, supra; Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Experience has repeatedly confirmed that many substances originating or used in the workplace present grave threats not only to workers who manufacture or handle such substances but also to community residents, consumers, other members of the public, and civil servants who provide services to sites where toxic substances are

found.[2] The state requirements sustained by the Third Circuit directly address these concerns. (Pet. App. C-4).

Specifically, these statutory measures ensure that hazardous substances used or sold within the Commonwealth are clearly identified, that businesses and individuals within the Commonwealth have access to basic information about these substances, and that the public, accordingly, may take steps to ensure that dangerous or even lethal substances are treated with proper regard. The provisions further ensure that members of the public and civil servants who must enter establishments where hazardous substances are found need not do so in ignorance and at their peril.

These measures, to be sure, may incidentally benefit workers who are exposed to the substances covered by the Pennsylvania statute. It is all but impossible, however, to conceive of any effort by the states to regulate toxic substances used, *inter alia*, in workplaces in order to protect state citizens generally that will not have such an incidental effect.

Thus, the burden of petitioners' preemption claim is that, in order to promote occupational safety and health, Congress intended that the OSH Act oust the states from exercising their historic police power over grave threats to the general public's health and safety posed by substances originating or used, *inter alia*, in workplaces. Nothing in the OSH Act or its legislative history provides any support for attributing such an unlikely intention to Congress.

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[2] Congress recently acted to meet these problems by enacting the Emergency Planning and Community Right-to-Know Act of 1986, creating a program of community access to information about toxic chemicals. 100 Stat. 1728-1747. This new law expressly provides that state or local laws are *not* preempted. Sec. 321, 100 Stat. 1747; see H. Rpt. No. 99-962, 99th Cong., 2d Sess. 302.

The OSH Act confers no authority upon OSHA to promulgate measures, such as those in dispute, that protect the public generally. OSHA is authorized to promulgate only "*occupational* safety and health standard[s]," which ensure "safe or healthful *employment* and places of *employment*." 29 U.S.C. § 653(8) (emphasis added). And Section 18 of the OSH Act precludes states from taking only such action as falls *directly* within this limited province. Specifically, that section preempts states (absent approval by OSHA) from "asserting jurisdiction under state law over any *occupational* safety or health issue with respect to which [a] standard is in effect . . . ." 29 U.S.C. § 667(a) (emphasis added). It is untenable to contend that Pennsylvania's action in safeguarding Pennsylvania consumers, residents of communities where toxic substances are found, other citizens at large, and state emergency-response agencies constitutes an assertion of jurisdiction over an occupational health issue committed to OSHA's regulatory authority. Thus, the Third Circuit correctly held in *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), where the court articulated the principles followed in this case:

> Because OSHA standards by definition govern occupational safety and health issues, they do not preempt state laws that regulate other concerns. The Secretary has authority to promulgate standards only as to occupational safety and health and those standards cannot have a preemptive effect beyond that field.[3] *Id.*, at 593.

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[3] Contrary to petitioners' assertion, the Third Circuit's decision in *Hughey* is not inconsistent with its decision in this case. The same court applied the same principles in each case. Any differences between the two decisions are attributable to differences between the state statutes involved, not to deficiencies or inconsistencies in analysis.

Nor does the Third Circuit's decision in this case conflict with the Sixth Circuit's decision in *Ohio Manufacturers' Association v. City of Akron*, 801 F.2d 824 (6th Cir. 1986), as petitioners suggest. That case addressed only whether OSHA's standard had any preemptive effect on local ordinances. The court expressly left open

Denying states the right to legislate in circumstances such as these would leave a gap in the regulation of health and safety issues. Neither the states nor OSHA would have authority to promulgate measures that would effectively protect the *public* against threats originating in the workplace. Far from intending this result, Congress' intent was plainly to avoid it by making clear in Section 18 of the OSH Act that the states are free to regulate where OSHA either *cannot* or *has not.*

Federal regulations, like federal statutes, may preempt state law; the test is whether the regulation shows an agency intent (consistent with the agency's statutory authority) to do so. The OSHA standard expressly notes that it is intended to "address comprehensively the issue of *evaluating and communicating chemical hazards to employees in the manufacturing sector*, and to preempt any state law pertaining to *this* subject." (Pet. App. E-1) (emphasis added). OSHA has clearly delimited the intended effect of its standard in a way that permits state regulation of nonmanufacturing workplaces and public access to hazard information.

3. Finding nothing in the OSH Act to support their position, petitioners insist that this Court's decisions construing the Employees Retirement Income Security Act of 1974 ("ERISA") are applicable to the OSH Act. Petitioners assert that just as ERISA preempts state laws having any connection with employee benefit plans, whether or not the state specifically intended to affect such plans, then by analogy the OSHA standard must preempt the provisions of state law challenged in this case. The analogy cuts just the other way. The sweeping preemption provision of ERISA, read in the light of unequivocal evidence—absent here—that Congress intended that ERISA broadly preempt state laws, makes clear by comparison that the much more narrow preemp-

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the question answered by the Third Circuit: whether provisions that address public protection may be severed from the balance of the statute.

tion provision of the OSH Act should not be construed to achieve the result petitioners seek.

As the Third Circuit noted in *Hughey, supra*, 774 F.2d at 593, ERISA's preemption provision broadly declares that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). In construing this provision, this Court has emphasized that Congress expressly rejected a proposal to provide for preemption of only those state laws that concern "specific subjects covered by ERISA," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983), opting instead for preemption in the "broadest sense" of "all actions of State or local governments" connected with employee benefit plans, *id.*, at 99, quoting 120 Cong. Rec. 29933. This Court's construction of ERISA implemented this Congressional objective.

By contrast, to leave no gaps in regulatory authority over health or safety issues, Congress as we have seen opted in the OSH Act for narrow preemption only of state attempts to "assert[] jurisdiction" over those specific "issue[s]" *both* falling within OSHA's focused regulatory authority *and* addressed by an OSHA standard in place. The Third Circuit properly implemented *this* Congressional purpose in addressing the relationship of the Pennsylvania law to the OSHA standard.

4. Petitioners further contend that in taking into account the purposes served by the challenged state legislation, the Third Circuit ignored this Court's admonition that a state's articulated purpose should not be dispositive in preemption analysis lest state legislatures be free to nullify "unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law." (Pet., at 18, quoting *Perez v. Campbell*, 402 U.S. 637, 652 (1971)). This contention misconceives what the Third Circuit did in this case.

As we have shown, Section 18 of the OSH Act requires an analysis of whether the state has attempted in a particular instance to "assert[] jurisdiction" over an occupational safety or health "issue" regulated by OSHA. In conducting this analysis, the Third Circuit necessarily considered the objectives of the state legislation. The Court did so by examining the nature of the obligations imposed by the statute.[4] Once having determined that the state had not taken action falling within the scope of the applicable OSHA standard, the Third Circuit further considered whether the *effect* of the state law would nonetheless preclude compliance with the federal standard or would otherwise frustrate the accomplishment of the federal objectives. Only after determining that the Pennsylvania statute would have no such effect, did the court sustain the statute against petitioners' challenge.[5]

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[4] In determining whether federal law preempts state law in other contexts, this Court has regularly examined state-law objectives to determine whether the state has undertaken directly to regulate subjects committed exclusively to federal regulation. See, *e.g., Pacific Gas & Elec. v. Energy Resources Comm'n* 461 U.S. 190, 213-216 (1983) (sustaining state nuclear legislation after determining that it had an economic purpose rather than a safety-related one); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (sustaining state cause of action for intentional infliction of emotional distress in labor context); *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 518 (1979) (sustaining state payment of employment compensation benefits to strikers in order to effectuate general remedial purposes).

In fact, in *Pacific Gas, supra*, the Court explained that the basis for the Court's holding in *Perez*, upon which petitioners rely, is that "there was an *actual conflict* between state and federal law [that] frustrated accomplishment of the federal objective." 461 U.S. at 216-217 n.28 (emphasis added). Absent such a conflict, the Court held, the admonition of *Perez* was not "apposite." *Ibid.* As we explain in text, the Third Circuit specifically determined that no such conflict existed in this case.

[5] Petitioners incorrectly assert that the Third Circuit erred in deciding the issue of implied preemption based on an incomplete record. (Pet., at 19 n.12). Petitioners fully briefed the implied

It is not correct to state that the Third Circuit upheld provisions of the Pennsylvania statute if that court could discern "any other purpose" besides occupational health and safety to support them. (Pet., at 15-17). That statute's public safety objectives are manifest in the provisions sustained by the court below. As we have described (at pp. 3, 5, *supra*), these provisions together establish a cohesive overall scheme of public hazard communication.[6]

5. Petitioners and *amici curiae* object that, absent a holding here that OSHA's standard preempts Pennsylvania's statute across the board, the several states will be left free to enact and enforce varying regulations of toxic substances used, *inter alia*, in workplaces. This contention overlooks the fact that the states have the historic right to regulate public health and safety and that Congress, in enacting the OSH Act, quite plainly left the states free to continue to fill their traditional role, except in the narrow circumstances spelled out in Section 18 of that Act. And, as we have shown, the state requirements at issue here do not fall within that proscription. If petitioners and *amici curiae* desire broader preemption of state regulation than Congress saw fit to prescribe in

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preemption question before the Third Circuit and raised no concerns before the court about a supposed insufficiency of the record on this question.

[6] The Third Circuit's analysis is completely in keeping with that in *Pacific Gas, supra*. In focusing on the expressed intent of the Pennsylvania legislature, the Third Circuit made an interpretation of state law in which this Court "place[s] considerable confidence." 461 U.S. at 214. Even when state statutes "are subject to varying interpretations," the Court has declined to "become embroiled in attempting to ascertain . . . [the] true motive." *Id.*, at 216. Indeed, inquiry into legislative motive is "particularly pointless . . . when it is clear that the States have been allowed to retain authority" over other issues. *Id.* As noted above, nothing could be clearer than Congress' intent in Section 18(a) of the OSH Act to allow the states just such authority over issues not directly regulated by an OSHA standard.

the OSH Act, then they should take their case to Congress and not to the courts.

The Third Circuit, in sum, conscientiously applied well-settled preemption principles to the circumstances of this case, and petitioners have demonstrated no reason why the Third Circuit's decision warrants plenary review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 86-1102

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, et. al.,

Petitioners

v.

JAMES W. KNEPPER, JR., et al.,

Respondents

ON CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

Respondents have failed to present any substantial reason why the Petition should not be granted. Their Brief in Opposition inaccurately describes the preemption test applied by the Third Circuit below, mischaracterizes the Pennsylvania Worker and Community Right-to-Know Act (the "Right-to-Know Act"),[1] and, while raising the specious specter of danger to state interests, ignores the real issue of the relationship of the state statute to the OSHA Hazard Communication Standard.[2]

Indeed their Brief unintentionally demonstrates why this Court should take this opportunity to address the vital issue of extent to which the Occupational Safety and Health Act of 1970[3] ("the OSH Act") preempts state hazard communication laws.

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[1] 35 PA. STAT. ANN. §§7301 et seq. (Purdon supp. 1986).

[2] 29 C.F.R. §§1910.1200 et seq.

[3] 29 U.S.C §§651 et seq.

The Third Circuit's Preemption Analysis Is An Extraordinary Departure from Established Precedent

Respondents' position highlights the conflict between the Third Circuit's decision below and the intent of the OSH Act,[4] as well as other decisions of this Court emphasizing the inappropriateness of relying on purported state purposes. Their brief wrongly creates the impression that the case involves only a conflict between the federal government's treatment of "worker protections" and the state's interest in protection of the "public at large", Brief in Opposition at 2-3, whereas the real problem arises because of state statutory provisions purportedly aimed at both goals.

Respondents admit that this Court has expressed its disapproval of treating a state purpose as "dispositive in preemption analysis." Brief in Opposition at 8. The Third Circuit abandoned traditional preemption analysis, which would have concentrated on the scope of the OSH Act, and made dispositive its interpretation of Pennsylvania's purpose. Even Respondents appear to recognize the real basis of the court of appeals' decision when they state that it "refus[ed] to strike down, on preemption grounds, those requirements of the Pennsylvania Act calculated to promote public health and safety." Brief in Opposition at 4. The court made no attempt to determine whether the provisions of the

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4 Respondents' appeal to the general proposition that state regulations are presumed to be valid unless shown to be contrary to the clear and manifest purpose of Congress has no relevance, since the Third Circuit had previously found that Congress did expressly intend that the OSH Act preempt state laws relating to the same subject. United Steelworkers of America v. Auchter, 763 F. 2d 728, 736 (3d Cir. 1985). This was later reaffirmed by the same court: "As we held in Steelworkers, section 18 of the OSH Act expressly preempts state law pertaining to issues that are addressed by OSHA standards unless a state plan has been approved by the Secretary." New Jersey Chamber of Commerce v. Hughey, 774 F. 2d 587, 592 (3d Cir. 1985).

Right-to-Know Act relate to anything covered by the OSHA Hazard Communication Standard.[5]

Respondents attempt to distinguish the express preemption analysis approved by this Court in cases involving the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. (1982) ("ERISA"), on the basis that those cases interpret a more sweeping preemption provision than that found in the OSH Act. Brief in Opposition at 7, 8. The key phrase in the two statutes is identical, however. ERISA states that it shall "supersede" any state laws that "relate to" any employee benefit plan. The OSH Act provides that OSHA must approve any state law "relating to" an occupational safety and health issue for which a federal standard is in effect. 29 U.S.C. §667 (b). Thus both statutes present the same question of the plain meaning of "relating to", and the ERISA cases interpreting the phrase are right on point.

No amount of effort by Respondents can place the decision by the court below within reasonable bounds of express preemption analysis as laid down by this Court. Therefore they would, as the Third Circuit did, create a new test to enable state hazard communication laws to be routinely upheld.

Petitioners Merely Seek Recognition of the Limits That Were Intended by Congress to Be Applied to States' Actions

Respondents claim that Petitioners desire to "oust" the states from exercising control over "grave threats" to public health that may "incidentally" affect workers. Brief in

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5 The Third Circuit completely failed to address the agency's stated purposes for promulgation of its Hazard Communication Standard. Respondents make the preposterous claim that the decision below actually comports with agency intent, Brief in Opposition at 7, in spite of the fact that OSHA specifically referred to state labeling and fact sheet requirements as burdens to OSHA's efforts to establish a comprehensive national standard. 48 Fed. Reg. 53329 (1983).

Opposition at 4, 5. They further fantasize that states will be unable to exercise their traditional police powers to protect public health, resulting in a "public health gap". Brief in Opposition at 7. Although Respondents' statements do highlight the importance of the issue before this Court, they misstate both Petitioners' position and the results of proper preemption analysis.

The Right-to-Know Act has far more than an "incidental" effect on workers claimed by Respondents as can be seen by the most cursory reading of the act. Indeed, most of the state statute's provisions relate in some manner to employee protection. Respondents' claim also directly contradicts findings by the District Court. Pet. App. C-4. Thus the "public health gap" is purely illusory, since the state has not attempted to enact a statute unrelated to issues under the jurisdiction of OSHA.

Petitioners, of course, agree that the protection of public health should generally remain within the states' police powers. The states can regulate in areas where OSHA has not. In fact, the states may even act in an area covered by an OSHA Standard if they first obtain the approval of OSHA. Congress clearly wanted to "oust" the states from exercising some of their police powers when it enacted the OSH Act, by prohibiting, without prior approval, all state legislation relating to the issues covered by an OSHA Standard. What the Third Circuit failed to do, and what preemption analysis requires, is to determine the extent to which the provisions of the Right-to-Know Act relate to the issues covered by the OSHA Hazard Communication Standard. If they do relate to such issues, they are preempted no matter what "public health" purposes may be imputed to them.

Conclusion

Respondents' emphasis on the concerns of the states really underscores the importance of this case to the federal-state system. It is apparent that the struggle over the proper

limits on state right-to-know laws has caused a large number of states and a wide spectrum of industry to look for a decision by this Court on the proper preemption analysis. The Writ should be issued.

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MANUFACTURERS ASSOCIATION OF TRI-COUNTY, ET AL.,
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) 651 *et seq.*, and the Occupational Safety and Health Administration's "Hazard Communication" standard, 29 C.F.R. 1910.1200, preempt provisions of the Pennsylvania Worker and Community Right-to-Know Act, Pa. Stat. Ann. tit. 35, § 7301 *et seq.* (Purdon Supp. 1987), that regulate the evaluation and communication of workplace chemical hazards for the benefit of both employees and the general public.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1102

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, ET AL., PETITIONERS

v.

JAMES W. KNEPPER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) 651 *et seq.* (OSH Act), authorizes the Department of Labor to regulate occupational exposure to hazardous chemicals. The Department's Occupational Safety and Health Administration (OSHA) has exercised that authority through the promulgation of a "Hazard Communication" standard governing the evaluation of workplace chemical hazards and communication of information about those hazards to employees in the manufacturing sector of the national economy. 29 C.F.R. 1910.1200. Pennsylvania has enacted a similar—but broader—statute, entitled the Worker and Community

Right-to-Know Act, Pa. Stat. Ann. tit. 35, § 7301 *et seq.* (Purdon Supp. 1987), that regulates the evaluation and communication of information about chemical hazards to employees in all sectors of the economy and to the general public.

Petitioner Manufacturers Association of Tri-County and allied organizations initiated this suit to prevent enforcement of the Pennsylvania statute, arguing, among other grounds, that the federal Hazard Communication standard preempts the state statute. The district court concluded that federal law preempts the state law "to the extent [that the state law] requires employers in the manufacturing sector to identify and disclose information concerning workplace hazards" (Pet. App. C3). The court of appeals affirmed in part and reversed in part, concluding that the district court had properly found no preemption outside the manufacturing sector, but had erred in determining which aspects of the Pennsylvania law applicable to the manufacturing sector are preempted (*id.* at A8).

1. Congress enacted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (§ 2(b), 29 U.S.C. 651(b)). The Act effectuates this goal through a program of cooperative federalism that includes "authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce" (§ 2(b)(3), 29 U.S.C. 651(b)(3)), while "encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" (§ 2(b)(11), 29 U.S.C. 651(b)(11)).

Section 6 of the OSH Act specifically authorizes the Secretary to establish federal occupational safety and health standards and sets forth detailed procedures for promulgating those standards (29 U.S.C. 655).[1] Section

[1] "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,

18(a) of the Act makes clear, however, that a state may continue to assert "jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect" (29 U.S.C. 667(a)). Section 18(b) further provides (29 U.S.C. 667(b)):

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [Section 6] shall submit a State plan for the development of such standards and their enforcement.

Section 18(c) specifies that the Secretary shall approve a state plan if, in his judgment, it meets various conditions. Among those conditions, the resulting state safety and health standards must be "at least as effective" as the existing federal standards in providing safe and healthful employment and places of employment (§ 18(c)(2), 29 U.S.C. 667(c)(2)). Furthermore, the state standards, when applicable to products used or distributed in interstate commerce, must be "required by compelling local conditions" and must "not unduly burden interstate commerce" (*ibid.*).

The Secretary has delegated to OSHA the authority to establish occupational safety and health standards and to approve state plans. 29 C.F.R. 1902.1, 1910.4(a). OSHA, in turn, has promulgated a number of federal standards and has set out detailed regulations governing the development, submission, and approval of state plans. See 29 C.F.R. Pts. 1902, 1910.

2. On November 25, 1983, OSHA promulgated a final rule establishing a federal "Hazard Communication" standard. 29 C.F.R. 1910.1200. See 48 Fed. Reg. 53280 (1983). This standard, which was established after exten-

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reasonably necessary or appropriate to provide safe or healthful employment and places of employment." § 3(8), 29 U.S.C. 652(8).

sive study, public comment, and review, is intended to "ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector" of the national economy (29 C.F.R. 1910.1200(a)).[2] The standard basically requires chemical manufacturers and importers to assess the hazards of their products, chemical distributors to provide this information through labeling and "material safety data sheets" (MSDSs) to other manufacturers who purchase the products, and manufacturing employers to transmit the information to their employees through "comprehensive hazard communication programs" (*ibid.*).[3]

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[2] The Hazard Communication standard relies on the Office of Management and Budget's Standard Industrial Classifications (Codes 20 through 39) to determine whether an employer is within the "manufacturing sector" of the economy. See 29 C.F.R. 1910.1200(b).

[3] The Hazard Communication standard requires the chemical manufacturer or importer to evaluate the hazards of his products in accordance with detailed criteria. See 29 C.F.R. 1910.1200(d) and Apps. A & B. He (or his distributor) must then ensure that each container of hazardous chemicals leaving the workplace is labeled with specified information. See 29 C.F.R. 1910.1200(f). The chemical manufacturer or importer must also develop an MSDS containing prescribed health and safety information. See 29 C.F.R. 1910.1200(g). He (or his distributor) must then ensure that the MSDS is provided to all manufacturers who purchase hazardous chemicals. *Ibid.*

The Hazard Communication standard further requires that the manufacturing employer develop a written hazard communication program for his workplace. See 29 C.F.R. 1910.1200(e). This program must list the hazardous chemicals found in the workplace and must specify, in accordance with prescribed criteria, the methods the employer will use to inform employees of the associated hazards. The employer is required to "provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area" (29 C.F.R.1910.1200(h)).

OSHA expressly provided in the Hazard Communication standard that it preempts state laws "pertaining" to the evaluation and communication of chemical hazards to manufacturing employees. The standard expressly states (29 C.F.R. 1910.1200(a)(2)):

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of [the OSH Act], which deals with state jurisdiction and state plans.

See 48 Fed. Reg. 53281, 53284, 53322-53323, 53334 (1983).

The United States Court of Appeals for the Third Circuit has since affirmed the validity of OSHA's Hazard Communication standard. See *United Steelworkers of America* v. *Auchter*, 763 F.2d 728 (1985).[4]

3. On October 5, 1984, Pennsylvania enacted its Worker and Community Right-to-Know Act, Pa. Stat. Ann. tit. 35, § 7301 *et seq.* (Purdon Supp. 1987). As the title suggests, the Pennsylvania statute is designed to provide employees and the surrounding community with information concerning hazardous chemicals stored and used in the workplace (*id.* § 7301 note (preamble)). The Pennsylvania statute is, in many respects, similar to OSHA's Hazard Communication standard. It requires employers to survey workplace chemical hazards (*id.*

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[4] The court of appeals also directed OSHA to consider whether the standard should be extended to employees in the non-manufacturing sectors of the economy. 763 F.2d at 736, 743. On August 24, 1987, following further court order (*United Steelworkers of America* v. *Pendergrass*, 819 F.2d 1263, 1270 (3d Cir. 1987)), OSHA issued a revised Hazard Communication standard, to become fully effective on May 23, 1988. See 52 Fed. Reg. 31852 (1987) (certain requirements shall be effective on Sept. 23, 1987). See discussion at pages 15-16, *infra*.

§ 7303(e)); it requires chemical manufacturers, importers, and distributors to label containers and provide MSDSs (*id.* § 7304); and it requires employers to institute employee information and training programs (*id.* § 7308).

The Pennsylvania statute also differs from the OSHA standard in a number of significant respects. For example, the state statute instructs a state agency to compile a list of hazardous chemicals, rather than relying on the chemical manufacturing industry to identify hazardous substances (Pa. Stat. Ann. tit. 35, § 7303(a) (Purdon Supp. 1987)). Furthermore, the state statute, unlike the OSHA standard, applies to both manufacturing and nonmanufacturing employers (*id.* § 7303(e)). It requires an employer to provide hazard information to the general public and to local police and fire departments (*id.* at § 7303(e) and (f)), and, upon request, to conduct an environmental hazard survey (*id.* § 7303(g)). The Pennsylvania statute also differs from the OSHA standard in a number of its specific requirements. In particular, it requires chemical manufacturers to provide labeling and MSDS information that is not required by the OSHA standard, such as more detailed ingredient information for chemical mixtures (*id.* §§ 7304(c), 7306(a)).

Pennsylvania has not submitted its Worker and Community Right-to-Know Act to OSHA for review under Section 18 of the OSH Act. The Pennsylvania statute does provide, however, that the state law "is to be read in conjunction with any provision of Federal law providing for the identification, labeling, or providing of information concerning hazardous substances and is intended to supplement such Federal regulation in the interests of protecting the health and safety of citizens of the Commonwealth." Pa. Stat. Ann. tit. 35, § 7319(b) (Purdon Supp. 1987). The statute further states that the state legislature intends to reexamine the legislation in the event that a court's application of federal preemption

principles "result[s] in lessening the burden on any employer" (*id.* § 7319(d)). The statute also provides that if any provisions of the act are determined to be invalid, the provisions shall be severable (*id.* § 7320).

4. Petitioners brought a suit in the United States District Court for the Middle District of Pennsylvania challenging the constitutionality of the Pennsylvania Right-to-Know Act. They argued, among other contentions, that Section 18 of the OSH Act and OSHA's Hazard Communication standard preempt the state law (Pet. App. C2). The district court, citing the Third Circuit's decision in *New Jersey State Chamber of Commerce* v. *Hughey*, 774 F.2d 587 (1985), concluded (Pet. App. C3):

> [T]he Right to Know Act is entirely preempted by federal law to the extent it requires employers in the manufacturing sector to identify and disclose information concerning workplace hazards. The Right to Know Act is not preempted as it applies to employers in the non-manufacturing sector, nor as it requires all employers to disclose information relating to environmental hazards, except for the labeling requirement in the manufacturing sector.

The district court elaborated on this holding with respect to each of the relevant provisions of the Pennsylvania statute (*id.* at C7-C17). It determined that subsections 7303(e), (f), (i), and (j) are preempted to the extent that they require manufacturing employers to complete hazardous substance survey forms (Pet. App. C11-C12). The court also concluded that subsection 7304(a) and Section 7306 are preempted to the extent that they require chemical suppliers to label containers shipped to manufacturing customers or that they require manufacturing employers to label containers in their workplace (*id.* at C13-C15). It next held that subsections 7304(b), (c), (d), (e), (f), and (g) are preempted to the extent that they require that a chemical supplier must provide a Pennsylvania MSDS when shipping chemicals that present only workplace hazards to manufacturing customers (Pet. App. C15-C16). Finally, the court determined that Sec-

tion 7308 is preempted to the extent that it requires manufacturing employers to conduct employee training programs and that subsection 7310(a) is preempted to the extent that it requires the Pennsylvania Department of Labor and Industry to conduct outreach programs to educate manufacturing employees concerning workplace safety (Pet. App. C16-C17).[5]

The court of appeals affirmed in part and reversed in part, stating (Pet. App. A8):

> We hold that the district court * * * correctly ruled that there was no OSH Act preemption outside the manufacturing sector, that the education and training requirement was preempted as to employees in the manufacturing sector, and that the Department Outreach program was preempted in that sector. We also hold that the district court erred in holding the hazard survey, labeling, and MSDS requirements totally preempted in the manufacturing sector.

The court of appeals stated that the OSH Act and the OSHA's Hazard Communication standard do not expressly preempt a state law unless the law has "as its primary purpose the promotion of occupational health and safety through hazard communication" (Pet. App. A16).

The court concluded that manufacturing employers must comply with the state statute's hazardous substance survey requirements because the completed survey not only provides hazard information to employees, it also contributes to community awareness of chemical hazards (Pet. App. A16-A17). The court further concluded that chemical manufacturers must comply with the state statute's labeling requirements because the completed labels, in addition to providing hazard warnings to employees, "facilitate" an employer's compliance with the

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[5] The court also concluded that the preempted provisions were severable and that the statute "does not violate the Commerce Clause or constitute a taking without just compensation" (Pet. App. C3). See *id.* at C17-C20.

hazardous substance surveys (*id.* at A18). The court reached the same conclusion with respect to most of the state statute's MSDS requirements (*id.* at A23-A24). The court further concluded that the OSH Act and the Hazard Communication standard do not preempt the hazardous substance survey, labeling, and MSDS requirements by implication (*id.* at A17, A20, A23-A24).[6]

DISCUSSION

Congress has authorized OSHA to establish federal occupational safety and health standards and has further provided that once OSHA addresses an occupational safety and health issue, a state must obtain federal approval before imposing occupational safety and health regulations "relating to" that issue (OSH Act § 18(b), 29 U.S.C. 667(b)). OSHA has comprehensively addressed the question of workplace chemical hazard communication in the manufacturing sector and has further stated that, absent federal approval, state laws "pertaining to" that issue are preempted (29 C.F.R. 1910.1200 (a)(2)). The OSH Act and OSHA's associated regulations therefore preempt the Pennsylvania's Worker and Community Right-to-Know Act's provisions specifying hazardous substance survey, labeling, and MSDS requirements, which have, as their primary purpose or effect, the regulation of communication of hazard information to manufacturing employees.

We submit that the court of appeals' decision is accordingly incorrect. We believe, however, that the question presented here does not presently warrant this Court's review. The court's decision is troublesome and will undoubtedly cause some confusion, but it should not have dire consequences. Federal and state laws concerning hazard communication are presently in a state of flux in light of recent statutory and regulatory developments.

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[6] The court of appeals affirmed the district court's rejection of petitioner's Commerce Clause and Takings Clause challenges (Pet. App. A26-A27).

These changes should help clarify and refine the respective roles of the federal and state governments. In the event that they do not, there will be future opportunities for other courts to address the question presented here and for the Third Circuit to reconsider its views. This Court should therefore await further developments before intervening in this complex and developing area of the law.

1. The Supremacy Clause authorizes Congress to enact laws that preempt otherwise valid state legislation. U.S. Const. Art. VI, Cl. 2.[7] As this Court has said repeatedly, the question whether Congress has exercised that power in any given case depends on "Congress's intent in enacting the federal statute at issue." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 738 (1985) (quotation marks and citations omitted). "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Ibid.* (quotation marks and citations omitted). "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Louisiana Public Service Commission* v. *FCC*, No. 84-871 (May 27, 1986), slip op. 12.[8]

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[7] See, *e.g.*, *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987); *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987); *Rose* v. *Arkansas State Police*, No. 85-1388 (Nov. 3, 1986); *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985); *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461 (1984); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *United States* v. *Shimer*, 367 U.S. 374 (1961); *City of Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958); *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218 (1947).

[8] See also, *e.g.*, *ICC* v. *Texas*, No. 85-1222 (Jan. 20, 1987), slip op. 2; *Hillsborough County* v. *Automated Medical Laboratories, Inc.*,

a. We believe that Congress's intent in this case is reasonably clear. Section 18(b) of the OSH Act provides that any state desiring to develop and enforce state occupational health and safety standards "relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" must submit a state plan for federal review. 29 U.S.C. 667(b). This provision unequivocally indicates that once OSHA issues a federal occupational safety and health standard, any state desiring to regulate the same subject matter must seek federal approval by submitting a "State plan for the development of such standards and their enforcement" (*ibid.*).

Congress, no doubt expecting that the states would comply with Section 18(b)'s submission requirements, did not explicitly specify the consequences of a state's failure to participate in the federal review process. But the consequences are inescapable: a federal standard preempts state regulations that "relat[e] to" its subject matter but have not received federal approval. *Auchter*, 763 F.2d at 736; see also *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), appeal pending, No. 86-1242; *Hughey*, 774 F.2d at 592-593. Further, OSHA's Hazard Communication standard expressly preempts any unapproved state law "pertaining to" the evaluation and communication of chemical hazards in the manufacturing sector. 29 C.F.R. 1910.1200 (a)(2). The standard's preemption provision is fully consistent with the language, purpose, and structure of the OSH Act.[9] And OSHA's regulatory interpretation is,

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471 U.S. 707, 713 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 381-383 (1961).

[9] The OSH Act's phrase "relating to" and the phrase "pertaining to," which appears in the standard itself, are, in this context, synonymous. As OSHA has explained, the Hazard Communication standard's express preemption provision is designed to effectuate

of course, entitled to deference from the courts.[10]

b. The crucial question in this case is the *scope* of federal preemption. Pennsylvania's Worker and Community Right-to-Know Act contains provisions that specify practices, means, and methods for the communication of chemical hazards and that are plainly intended, among other purposes, to regulate the communication of workplace hazards to manufacturing employees.[11] All of the parties agree that the OSH Act and the OSHA Hazard Communication standard preempt at least some of these provisions. See Pet. App. C2-C3.

The courts below correctly recognized that the Pennsylvania statute is severable and that, as a general matter, federal law should preempt no more than what is required to satisfy congressional objectives. They correctly held that OSHA's Hazard Communication standard does not preempt the provisions of Pennsylvania law

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Congress's goal of ensuring that once a federal occupational standard is formulated, the uniform federal standard may be displaced only by a state plan that includes standards which are "at least as effective" as the federal standards and, in the case of goods distributed in interstate commerce, are "required by compelling local conditions," and do not "unduly burden interstate commerce" (OSH Act § 18(c)(2), 29 U.S.C. 667(c)(2)). See 48 Fed. Reg. 53322-53323 (1983). Indeed, the OSH Act's elaborate federal approval standards would be meaningless if state regulations relating to the subject of an OSHA standard had equal validity whether or not they had received federal approval.

[10] See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-700 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 381-383 (1961). See also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).

[11] The Pennsylvania statute imposes obligations on both manufacturing and nonmanufacturing employers "to make available to employees * * * the identity of chemicals used in the workplace, and to make information available as to the known or suspected health hazards posed by the use of or exposure to hazardous substances." Pa. Stat. Ann. tit. 35, § 7301 note (preamble) (Purdon Supp. 1987). See generally pages 5-7, *supra*.

directed solely to communication of chemical hazards to nonmanufacturing employees and the general public. Significantly, they also correctly held that the Hazard Communication standard does preempt the provisions of the Pennsylvania law directed solely to communication of chemical hazards to employees within the manufacturing sector. But we believe the court of appeals erred in further concluding that the Hazard Communication standard does not preempt application of state law provisions—such as the Pennsylvania statute's hazardous substance survey, labeling, and MSDS requirements—that are designed to communicate hazard information to *both* manufacturing employees and other persons. The court of appeals claimed to preempt only those provisions that have as their "primary purpose the promotion of occupational health and safety" (Pet. App. A16). In its application of that test, however, it effectively ruled that chemical manufacturers and manufacturing employers must comply with any state law provision that facilitates both occupational and nonoccupational objectives. We believe that this holding is incorrect.

As we have explained, OSHA's Hazard Communication standard preempts application of the state statute's provisions "pertaining to" communication of workplace hazards in the manufacturing sector. 29 C.F.R. 1910.1200 (a)(2). As OSHA construes its own standard, it preempts any state law provision that, in primary purpose *or* effect, regulates the evaluation and communication of occupational chemical hazards in the manufacturing sector. OSHA further believes that Pennsylvania's hazard survey, labeling, and MSDS requirements primarily address or affect workplace hazard communication and thus "pertain[] to" the subject of federal regulation, as the district court below found. OSHA accordingly disagrees with the court of appeals' "primary purpose" formulation to the extent that it holds that the "primary" objective of a state provision was nonoccupational simply because

it served a purpose in addition to occupational safety or health.[12]

2. Although we submit that the court of appeals erred, we do not believe that the case warrants this Court's review. The decision below will undoubtedly cause some confusion concerning the controlling legal standards for federal preemption of state right-to-know statutes and may impose additional burdens on chemical manufacturers and manufacturing employers. But we believe, on balance, that the case will not have great significance and that, for several reasons, this Court's consideration of the issue can profitably be postponed.

We are not convinced that the court of appeals' decision will have important precedential effect. At present, a number of states have enacted right-to-know statutes without seeking federal approval. Amicus Br. 14 & n.30. With the exception of New Jersey's, however, none of these statutes has been challenged on preemption

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[12] There is no occasion here to define further the contours of federal preemption under OSHA's Hazard Communication standard, or for that matter, to address the scope of any "implied preemption" that might exist under the OSH Act. For present purposes, it is sufficient simply to recognize that OSHA's standard expressly preempts application, in the manufacturing sector, of state law provisions that, as their primary purpose or effect, regulate workplace hazard communication. Petitioners (Pet. 14-15) and their amici (Br. 17) suggest that further guidance concerning the preemptive effect of the OSH Act and the OSHA standard can be gleaned from decisions of this Court interpreting the preemption provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (ERISA). See *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987) slip op. 6 (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985), and *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). See also *Fort Halifax Packing Co.* v. *Coyne*, No. 86-341 (June 1, 1987). *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). We do not agree with petitioner (Pet. 14-15) or their amici (Br. 17) that those cases necessarily provide reliable guidance in the OSHA preemption inquiry, and for the reasons set forth below, see pages 14-18, *infra*, do not believe that this is an appropriate case for this Court to explore this issue.

grounds.[13] Moreover, even if other courts are faced with the preemption issue and agree with the court of appeals' analysis, it is not at all clear that they would apply that analysis in a manner incompatible with the OSH Act, such is the indeterminate character of the "primary purpose" test enunciated by the court below.

Moreover, what significance the decision might otherwise have has been minimized by subsequent events. On August 24, 1987, pursuant to court order (see note 4, *supra*), OSHA took action that will extend its Hazard Communication standard to the nonmanufacturing sectors of the economy. See 52 Fed. Reg. 31852 (1987). This extension, which becomes fully effective on May 23, 1988, will substantially alter the scope of federal preemption in this area and may leave little room for states to regulate *any* occupational hazard communication without obtaining OSHA approval. The regulatory revision probably will not moot the precise question presented here—whether the federal standard preempts a state law provision that provides both occupational and nonoccupational hazard information. But it is likely to diminish substantially the importance of state right-to-know statutes in the workplace and might cause those states that have not achieved, and do not intend to seek, "state plan" status under the OSH Act (see 29 C.F.R. Pts. 1902

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[13] In *Hughey*, the Third Circuit ruled that OSHA's Hazard Communication standard preempts the New Jersey Worker and Community Right to Know Act within the manufacturing sector to the extent that the state statute regulates the communication of workplace, as distinct from environmental, hazards. See 774 F.2d at 592-596. The court first articulated its "primary purpose" test in that case. It ruled that a provision requiring manufacturers to complete workplace hazard surveys and provide them to local officials is preempted because the provision's "primary purpose" is the promotion of occupational safety and health. 774 F.2d at 595. We think that *Hughey*'s holding cannot easily be squared with the court's ruling in this case. Thus, the Third Circuit's approach to OSH Act preemption does not appear totally settled and might be clarified in future cases.

and 1952) to limit their right-to-know activities exclusively to the nonoccupational sphere.

In addition, Congress has recently enacted legislation specifically addressing the states' authority to enact nonoccupational right-to-know statutes. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, Tit. III, 100 Stat. 1728-1758 (Title III). See also 52 Fed. Reg. 2836 (1987) (proposed regulations). This far-reaching legislation (which was enacted shortly after the court of appeals' decision in this case) significantly changes the entire legal landscape underlying state right-to-know laws. Title III, captioned "Emergency Planning and Community Right-to-Know" (100 Stat. 1728), creates a comprehensive federal framework concerning state nonoccupational hazard communication programs. See H.R. Rep. 99-253, 99th Cong., 1st Sess. 59 (1985). The statute basically requires each state to establish an emergency response commission and local planning districts and committees (§ 301, 100 Stat. 1729-1730). These organizations are responsible for the development of an emergency response plan to be followed in the event that facilities storing and handling "extremely hazardous substances" (§ 302, 100 Stat. 1730-1731) release those substances into the surrounding environment. See §§ 303-305, 100 Stat. 1731-1736.

Title III requires covered facilities to provide the Environmental Protection Agency (EPA) and various state and local agencies with extensive information concerning other potential chemical hazards. See §§ 311-313, 100 Stat. 1736-1747. These reporting provisions build, in large part, on OSHA's Hazard Communication standard.[14] Furthermore, Title III expressly states that its

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[14] Section 311 provides that each owner or operator of a facility that is required by the OSH Act and regulations promulgated thereunder to prepare or have available an MSDS for a hazardous chemical, must submit that form or a list of such chemicals to the state's emergency response commission, the local emergency planning agency, and the local fire department (§ 311, 100 Stat. 1736). Title III also requires those same owners and operators to

provisions shall not preempt or affect state laws, subject to a single exception: state laws enacted after August 1, 1985, that require submission of an MSDS "shall require that the data sheet be identical in content and format" to the federally required form, subject to a counter-exception that states may require supplemental information "through additional sheets attached to the data sheet" or through another appropriate method. § 321, 100 Stat. 1747.

Thus, Title III sets forth certain basic requirements for hazard communication in the nonoccupational setting and reaffirms the states' powers to impose additional nonoccupational requirements. Title III does not moot the present controversy but—as in the case of OSHA's Hazard Communication standard revisions—it is likely to prompt states to reexamine their right-to-know laws with an eye toward establishing federal-state harmony in the area. Indeed, the House Energy and Commerce Committee expressed its "hope that even where there is some discretion, States and localities will follow the Federal program closely." H.R. Rep. 99-253, *supra*, at 115.[15]

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prepare and submit hazardous chemical inventories, detailing the amount of hazardous chemicals at the facilities (§ 312, 100 Stat. 1738-1741) and toxic chemical release reports detailing releases of toxic substances (§ 313, 100 Stat. 1741-1747). The statute provides limited trade secret protection (§ 322, 100 Stat. 1747-1750), but otherwise makes the reported information available to health care professionals (§ 323, 100 Stat. 1750-1752) and the public (§ 324, 100 Stat. 1752).

[15] The committee further stated (H.R. Rep. 99-253, *supra*, at 115):

> Because a great deal of the hazardous chemicals covered by this title will be traveling in interstate commerce, it makes sense that the Federal law should control in this area.
>
> * * * It is the intent of the Committee that such additional [MSDS] requirements be reasonable and concise. It would be most unfortunate if the public's ability to learn about hazardous chemicals in its midst would become impaired because of a plethora of inconsistent, impractical state and local requirements.

We are hopeful that Pennsylvania (and other similarly situated states) will reconsider their legislation in light of the clear dictates of the OSH Act, the much-expanded OSHA standard, and the newly enacted Title III. Federal law leaves no doubt that the states can pursue their occupational hazard communication objectives through a federally approved workplace hazard communication program. And the states can pursue their nonoccupational hazard communication objectives, subject to modest federal constraints, provided that they do not enact statutory provisions that impermissibly commingle occupational and non-occupational objectives. Thus, we believe that this Court should withhold action until the states themselves have had an opportunity to act. In the event that the dispute here persists, there will be ample opportunity for the courts to reexamine the issue and for the Third Circuit to reconsider its decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this Supplemental Brief, pursuant to Rule 22.6 of the Court's Rules, in response to the Brief for the United States as Amicus Curiae submitted on September 2, 1987, by invitation of the Court.[1] This Supplemental Brief is necessary because the Solicitor General's conclusion that certiorari should be denied in this case is based largely upon recent developments not previously addressed by the parties, and in particular on the Occupational Safety and Health Administration's ("OSHA") issuance of a revised and expanded Hazard Communication Standard subsequent to the filing of our petition and reply.

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[1] Petitioners refer the Court to the Petition for Writ of Certiorari at i-ii and n.1 for a listing of parents, subsidiaries and affiliates of corporate parties pursuant to Rule 28.1 of this Court.

ARGUMENT

The Solicitor General agrees with Petitioners' legal position that the decision of the United States Court of Appeals for the Third Circuit below is in error. He recognizes that Congress, in enacting Section 18(b) of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 667(b), preempted any state laws "relating to" the subject of a federal standard that have not received federal approval as part of a state plan. Brief for the United States at 11. Most important, he agrees with Petitioners that the Court of Appeals improperly upheld any provisions of the Pennsylvania Worker and Community Right-to-Know Act [2] that could be viewed as serving some other non-occupational objective in addition to their occupational safety and health functions. *Id.* at 13-14. The Court of Appeals' decision, as the Solicitor General states, "will undoubtedly cause some confusion concerning the controlling legal standards for federal preemption of state right-to-know statutes and may impose additional burdens on chemical manufacturers and manufacturing employers." *Id.* at 14.

Nevertheless, the Solicitor General concludes that the Court should deny certiorari because of two recent developments—OSHA's expansion of the Hazard Communication Standard to cover the nonmanufacturing sector announced in August 1987 [3] and Congress' enactment of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA").[4] Neither of these events, as the Solicitor General admits, moots the issues presented in this case. Instead, he argues that they counsel denial of certiorari for purely prudential reasons. Brief of the United States at 15, 17. We respectfully submit that the

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[2] Pa. Stat. Ann. tit. 35, §§ 7301-7320 (Purdon Supp. 1986).

[3] 52 Fed. Reg. 31,852 (1987).

[4] 100 Stat. 1728-58. This statute was enacted as Title III, §§ 300-330, of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986).

Solicitor General, while correct in asserting that the Court of Appeals' decision was wrong as a matter of law, is clearly incorrect in his evaluation of the consequences of the recent developments upon which he relies.

A. The Expanded Hazard Communication Standard Increases the Need for Review

OSHA's expansion of the Hazard Communication Standard to nonmanufacturing employers, to which the Solicitor General evidently attaches the greatest weight, actually strengthens, rather than weakens, the case for granting certiorari.

By expanding the scope of the Hazard Communication standard, OSHA believed that it had "significantly expand[ed] the area in which state and local laws will be preempted." 52 Fed. Reg. 31,860. According to OSHA, this is desirable because a "uniform" federal Standard will benefit companies engaged in interstate commerce by preempting "different and potentially conflicting State and local laws." *Id.* at 31,857. The Solicitor General observes that OSHA's action should "leave little room for states to regulate *any* occupational hazard communication without obtaining OSHA approval." Brief of the United States at 15 (emphasis in original). We entirely agree with this statement of the law. But what the Solicitor General fails to recognize is that the expansion of the Standard to reach all employers cannot mitigate the holding of the Court of Appeals concerning the scope of preemption for covered employers. Instead, the Court of Appeals' decision, if left standing, will change the Solicitor General's "little room" to wide open spaces for state regulation.

The central issue in this case is whether, as the Court of Appeals held, the existence of any purpose in addition to workplace protection permits a state to continue to regulate in an area where it would otherwise be preempted by an OSHA standard. The Court of Appeals

has opened the door to easy circumvention of the congressional preemption scheme by allowing states to avert federal preemption merely by proclaiming that their statutes or regulations, although clearly relating to the workplace, also serve some other purpose.[5] The greater scope of preemption under the expanded Standard simply enlarges the area in which the Court of Appeals' decision invites the states to subvert the intent of Congress and OSHA by adding non-occupational purposes to their right-to-know laws rather than participating in the state plan process. Far from reducing the practical need for this Court to review the Court of Appeals' decision, OSHA's expansion of the Standard has made that review more critical than ever.

B. The Federal Community Right-to-Know Law Does Not Affect the Importance of Preemption Under the OSH Act

Likewise, the new federal Emergency Planning and Community Right-to-Know Act affords no basis for the Court to decline to consider a case such as this which is otherwise worthy of review. EPCRA provides a federal framework for the provision of hazardous substance information to communities, but nothing in the language of EPCRA or its legislative history purports to authorize state or local laws that would be preempted by Section 18(b) of the OSH Act and OSHA standards. EPCRA is thus irrelevant to the issue presented in this case:

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[5] The Solicitor General apparently assumes that the numerous state right-to-know statutes presently in force were principally enacted to fill the nonmanufacturing occupational gap where OSHA had yet to regulate, and that the states will now abandon their statutes as redundant. But Pennsylvania's law, like that of several other states, *see* Brief of Amici Curiae Chemical Manufacturers Association *et al.* at 14 n.30 and Appendix, was specifically enacted to regulate both the manufacturing and nonmanufacturing sectors even after the original OSHA Standard covering manufacturing employers had been adopted, thus contesting rather than complementing the limits of exclusive federal authority.

whether state statutory and regulatory requirements concerning workplace protection can escape preemption because they are also said to advance some non-occupational purpose.

The Solicitor General recognizes that the Court of Appeals wrongly allowed such dual-purpose state requirements to be enforced, and does not assert that EPCRA allows a state to do what would otherwise be preempted under the OSH Act.[6] Nevertheless, the Solicitor General suggests that this Court should defer action because states may reexamine their right-to-know laws due to EPCRA "with an eye toward establishing federal-state harmony." Brief of the United States at 17. Whether state requirements are relatively harmonious with or divergent from EPCRA, however, is beside the point. No state requirements can escape preemption under Section 18 of the OSH Act if they also relate to an issue covered by an OSHA standard. In sum, EPCRA does not lessen the need to determine the scope of preemption where states have asserted commingled occupational and community purposes, and it affords no reason why this Court should allow what the Solicitor General characterizes as an erroneous and burdensome decision to stand.

C. The Issues Are Ripe for This Court's Review

The Solicitor General believes that the expanded Hazard Communication Standard and EPCRA may prompt the states to undertake some review of their own right-to-know laws. But this only emphasizes the importance of reviewing the Court of Appeals' decision now. Whatever the states may do can only benefit from this Court's guidance as to the proper scope of preemption under the

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[6] OSHA, discussing EPCRA in the preamble to the expanded Hazard Communication Standard, indicated only that employers would have certain increased responsibilities due to the interplay of EPCRA and the Standard, and did not suggest that EPCRA bears any relation to the Standard's preemptive effect. 52 Fed. Reg. 31,859-60.

OSH Act. Nothing will be gained by allowing the states to proceed under the illusion that the approach taken by the Court of Appeals below is correct. To the contrary, by allowing the Court of Appeals' decision to stand, the Court would be encouraging states to engage in extensive legislative activity based upon a misapprehension of the law and would be setting the stage for even more litigation later.

The Government here expresses no more than a pious wish that the states will voluntarily cease their attempts to legislate in areas covered by the OSHA Standard without approval by OSHA. That wish is unlikely to come true so long as the Court of Appeals' decision remains in force. That decision has so altered the judicial landscape that to deny review would increase confusion in the law and multiply the burdens on interstate commerce that Congress in the OSH Act sought to prevent.

CONCLUSION

For the reasons stated herein and in our petition and reply brief, the Petition for Writ of Certiorari in this case should be granted.

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IN THE

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OCTOBER TERM, 1986

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, *et al.*,
Petitioners,

v.

JAMES W. KNEPPER, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF *AMICI CURIAE* CHEMICAL MANUFACTURERS ASSOCIATION NATIONAL PAINT AND COATINGS ASSOCIATION SOCIETY OF THE PLASTICS INDUSTRY, INC. NATIONAL ASSOCIATION OF MANUFACTURERS NATIONAL ASSOCIATION OF PRINTING INK MANUFACTURERS CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION SOCIETY OF AMERICAN WOOD PRESERVERS, INC. IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* CHEMICAL MANUFACTURERS ASSOCIATION NATIONAL PAINT AND COATINGS ASSOCIATION SOCIETY OF THE PLASTICS INDUSTRY, INC. NATIONAL ASSOCIATION OF MANUFACTURERS NATIONAL ASSOCIATION OF PRINTING INK MANUFACTURERS CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION SOCIETY OF AMERICAN WOOD PRESERVERS, INC. IN SUPPORT OF PETITIONERS

Chemical Manufacturers Association ("CMA"), National Paint and Coatings Association ("NPCA"), Society of the Plastics Industry, Inc., National Association of Manufacturers of the United States of America ("NAM"), National Association of Printing Ink Manufacturers ("NAPIM"), Chemical Specialties Manufacturers Association ("CSMA") and Society of American Wood Preservers, Inc. submit this brief as *amici curiae* in support of the petition for Writ of Certiorari by Manufacturers Association of Tri-County, *et al.*, seeking re-

view of the judgment and opinion of the United States Court of Appeals for the Third Circuit entered September 12, 1986. All parties to the case below have consented to the filing of this brief.

INTEREST OF *AMICI CURIAE*

Amici are trade associations [1] whose members are subject to the requirements of the federal Hazard Commu-

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[1] Chemical Manufacturers Association is a nonprofit trade association whose 171 member companies represent more than 90% of the productive capacity of basic industrial chemicals within the United States.

National Paint and Coatings Association is a nonprofit trade association representing approximately 800 members who are engaged in the manufacture and distribution of about 90% of the total national volume of paint, varnish, lacquer, and allied products. 60% of NPCA member plants are small facilities with less than 20 employees.

The Society of the Plastics Industry, Inc. is a nonprofit trade association composed of approximately 1800 member companies and individuals who supply raw materials, process or manufacture plastics or plastic products or related equipment and machinery, and who are responsible for an estimated 75% of the total dollar volume of sales of plastics in this country.

National Association of Manufacturers of the United States of America is a nonprofit voluntary business association which represents approximately 13,000 companies nationwide. The membership of the NAM represents an estimated 80% of all goods manufactured in the United States and its members employ approximately 85% of all workers in the manufacturing sector.

The National Association of Printing Ink Manufacturers is a nonprofit trade association representing 126 companies which manufacture and market printing ink or printing ink raw materials and account for approximately 90% of the total shipments of printing ink in the United States.

The Chemical Specialties Manufacturers Association consists of over 400 companies engaged in the manufacture, distribution and marketing of formulated chemical specialty products to consumers as well as industrial and institutional markets.

The Society of American Wood Preservers, Inc. represents approximately 105 companies in the waterborne wood preserving industry, treating plants and chemical suppliers.

nication Standard[2] promulgated by the Occupational Safety and Health Administration, pursuant to the Occupational Safety and Health Act of 1970.[3]

CMA, NPCA, NAM, NAPIM, and CSMA participated actively in the agency proceedings which led to the adoption of the Hazard Communication Standard. CMA and NPCA also were intervenors in an earlier case before the Third Circuit Court of Appeals in which the validity of this standard and its preemptive effect on state regulation were established. *United Steelworkers of America, AFL-CIO-CLC v. Auchter*, 763 F.2d 728 (3d Cir. 1985).[4]

Amici have a substantial interest in the outcome of this litigation because the decision below, if allowed to stand, would be regarded as a leading precedent in determining the validity of state and local "right-to-know" legislation. As discussed below, numerous laws of this kind are now in force, imposing a wide variety of substance disclosure requirements. Many of the member companies of *amici* are nationwide businesses that regularly ship their products in interstate commerce, and rely on standardized data and labels to provide purchasers with safety information concerning their products. The court of appeals' decision here threatens to subject them to dozens of diverse and inconsistent state and local hazard communication requirements in addition to the obligations imposed by the federal Standard. Compliance with a multitude of state requirements could pose insuperable obstacles, and the resulting confusion could

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[2] 29 C.F.R. § 1910.1200 (1986); Appendix to Petition ("App.") E-1.

[3] 29 U.S.C. §§ 651 *et seq.* (1982).

[4] The Third Circuit, in *United Steelworkers*, was not considering the validity of any specific state law, and thus, unlike the court of appeals here, had no occasion to address the appropriate test for preemption of state "right-to-know" requirements under the federal Standard.

actually endanger rather than enhance workplace safety. American manufacturers, faced with an increasing emphasis on workplace, environmental and product safety, coupled with tremendous international competitive pressures, must be permitted to operate under reasonably consistent regulatory standards from state to state and at the federal level. Because we believe that this Court should grant the petition and clarify the scope of preemption under the Occupational Safety and Health Act, we submit this brief *amici curiae.*

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS UNDERMINED THE CAREFULLY BALANCED PREEMPTION SCHEME OF THE OSH ACT, AND DESTROYED THE UNIFORMITY OF HAZARD COMMUNICATION REGULATION, BY ENCOURAGING DUPLICATIVE AND BURDENSOME STATE "RIGHT-TO-KNOW" LEGISLATION

Review of the court of appeals' decision is necessary to prevent federal supremacy from being undermined in an important area of federal regulation. Congress, in the OSH Act, has created a carefully crafted preemption scheme. By its overly deferential preemption analysis, the Third Circuit has issued an open invitation to the states to circumvent the stringent conditions of the OSH Act through artful draftsmanship. In so doing, the court of appeals has ignored the preemption test set forth by Congress and OSHA. It has paid no more than perfunctory attention to the OSH Act, and no attention at all to OSHA's explanation of the preemptive effect of the Hazard Communication Standard. Instead, it has striven to find any excuse for upholding the provisions of the Pennsylvania Worker and Community Right-to-Know Act [5]

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[5] Pa. Stat. Ann. tit. 35, §§ 7301 *et seq.* (Purdon Supp. 1986); App. F-1.

even in the manufacturing sector where the federal Standard is controlling.[6]

Amici concur in petitioners' reasons for requesting this Court's review. We demonstrate that the court of appeals' unprecedented departure from the scheme of the OSH Act disregards Congressional and agency intent, and will have a serious impact on nationwide industries in light of the widespread and growing number of state "right-to-know" laws. We further show that a broad preemption test would be consistent with the scheme of the OSH Act, and would mitigate the harms inflicted by multiple state laws while affording states the opportunity to protect their legitimate interests.

A. The Court of Appeals' Decision Conflicts With the OSH Act and the OSHA Hazard Communication Standard

1. *Congress established a preemption scheme in the OSH Act designed to accommodate legitimate state regulatory interests while giving OSHA responsibility for preventing burdens on interstate commerce*

The OSH Act empowers OSHA[7] to promulgate by rule nationwide occupational safety and health standards.[8] Section 18 of the Act is an express statement of Congress's intent to preempt state regulatory authority over

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[6] OSHA has initiated a rulemaking proceeding, pursuant to the Third Circuit's mandate in *United Steelworkers*, 763 F.2d at 738, to extend the Standard to the non-manufacturing sector generally. Hazard Communication: Advance Notice of Proposed Rulemaking, 50 Fed. Reg. 48,794 (1985).

[7] The authority that the Act confers on the Secretary of Labor has been delegated to the Assistant Secretary for Occupational Safety and Health. 29 C.F.R. §§ 1902.1(a), 1910.4(a) (1986).

[8] Section 6(a), 29 U.S.C. § 655(a) (1982); App. D-1.

issues as to which OSHA has promulgated standards.[9] Once OSHA has addressed an occupational safety and health issue in a standard, states may regulate matters related to that issue only if they obtain OSHA approval of their regulations as part of a "state plan":

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety and health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.[10]

State plans must be approved by OSHA if the criteria of Section 18(c)[11] are met. These criteria reflect Congress's concern both that federal standards not be diluted, and that disparate state regulation not impair interstate commerce. Section 18(c) provides that state standards will be approved only where they are "at least as effective in providing safe and healthful employment and places of employment" as the pertinent OSHA standard, and, when applicable to products distributed or used in interstate commerce, such standards are "required by compelling local conditions" and do not "unduly burden interstate commerce."[12] Other provisions of Section 18 establish that Congress also intended OSHA to maintain significant procedural oversight over state regulatory activity after approval of a state's plan.[13]

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[9] 29 U.S.C. § 667 (1985); Petition 1-3. Section 18(a) preserves state jurisdiction over occupational safety and health issues "with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. § 667(a); Petition 1.

[10] Section 18(b), 29 U.S.C. § 667(b) (1982); Petition 2.

[11] 29 U.S.C. § 667(c) (1982); Petition 2-3.

[12] Section 18(c)(2), 29 U.S.C. § 667(c)(2) (1982); Petition 2.

[13] Section 18(c)(4), (5), (7), (8), 29 U.S.C. § 667(c)(4), (5), (7), (8); Petition 3 (required state assurances and reporting re-

Congress, in the OSH Act, clearly wished to avoid the potentially devastating effects of multiple state regulation on products distributed or used in interstate commerce. The cumulative impact of variations in state regulatory schemes is especially severe for businesses that ship products to purchasers in every state and, as a matter of economic necessity, must rely on standardized safety protections. To mitigate this burden, as noted above, Congress expressly required OSHA to decide whether a state could show that "compelling local conditions" were present and to evaluate the burden on commerce, rather than authorizing the states to regulate concurrently with OSHA. Senator Saxbe, who proposed the amendment to the OSH Act incorporating these tests, explained that multiple safety regulation on equipment moving between states would "place a tremendous burden on interstate commerce." [14] Likewise, Congressman Railsback stated that such a requirement was necessary to "protect a . . . manufacturer of products moving in interstate commerce from having to custom-build a product to meet the various requirements of the several States in the absence of unusual conditions." [15]

In promulgating the Hazard Communication Standard, OSHA carried out the intent of Congress by establishing beyond doubt that the Standard would preempt similar state and local "right-to-know" legislation. The Standard expressly provides that states may only continue to regulate in the area covered by federal regulation pursuant to an approved state plan:

> This occupational safety and health standard is intended to address comprehensively the issue of evalu-

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quirements); Section 18(e), 29 U.S.C. § 667(e) (1982) (OSHA retention of jurisdiction); Section 18(f), 29 U.S.C. § 667(f) (continuing evaluation of state plans).

[14] 116 Cong. Rec. 37,622 (1970) (statement of Sen. Saxbe).

[15] 116 Cong. Rec. 38,703 (1970) (statement of Rep. Railsback).

> ating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*) which deals with state jurisdiction and state plans.[16]

In the preamble to the Standard,[17] one of the reasons that OSHA identified as supporting preemption was the "recent proliferation of state and local right-to-know laws," given that "[m]ost companies in the manufacturing sector have business dealings which involve interstate commerce, and are thus potentially subject to numerous different and potentially conflicting regulations." [18] Industry representatives, as OSHA acknowledged, had observed that the "potential for conflicting or cumulatively burdensome State and local laws" was "immense." [19] Summarizing the regulatory burden of the Standard, OSHA observed that the coverage and requirements of then-existing state and local "right-to-know" law were "consistent only in their inconsistency," and that the "consequent cost and ineffectiveness of this decentralized effort has been well documented." [20] Finally, OSHA explained that the express preemption provision of the Standard would "serve to reduce the burden on

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[16] 29 C.F.R. § 1910.1200(a)(2); App. E-1.

[17] A regulatory preamble demonstrates agency intent, *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, ——, 105 S.Ct. 2371, 2377 (1985); *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 158 (1982), even though it does not, of course, have the same binding legal force as the regulation to which it relates. *Chrysler Corp. v. Brown*, 441 U.S. 281, 315-16 (1979).

[18] 48 Fed. Reg. 53,283 (1983).

[19] *Id.* at 53,284.

[20] *Id.* at 53,324.

interstate commerce produced by conflicting state and local regulations" and "ensure that all employees in the manufacturing sector are accorded the same degree of protection." [21]

2.. The court of appeals' "any other purpose" test subverts the OSH Act scheme by making it unnecessary for states to seek OSHA state plan approval in order to avert preemption of their own "right-to-know" legislation

Federal legislation displaces all state enactments where Congress's intent to preempt is "explicitly stated in the statute's language or implicitly contained in its structure and purpose," even absent any conflict. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). The expressed intent of Congress must always be given effect, *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), and indeed is the "ultimate touchstone" of preemption analysis. *Retail Clerks International Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). It is the duty of the courts to interpret a statute in the manner "most harmonious with its scheme and with the general purposes that Congress manifested." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984), *quoting NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part).

Furthermore, it is well settled that federal regulations representing a reasonable accommodation of matters committed to the agency's care are entitled to judicial deference where there is no conflict with the governing statute. *Chevron U.S.A., Inc.*, 467 U.S. at 843-44; *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982); *Blum v. Bacon*, 457 U.S. 132, 141 (1982). Indeed, such regulations have no less preemptive effect than their underlying statutes. *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 1898

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[21] *Id.* at 53,334.

(1986); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, ——, 105 S.Ct. 2371, 2375 (1985); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984); *Fidelity Federal*, 458 U.S. at 153.[22]

The court of appeals' cavalier disregard of the OSH Act scheme and of the intent of OSHA here is astonishing. The court, after a passing reference to the statutory preemption test, and while purporting to determine the "primary purpose" of the Pennsylvania legislation, actually upheld every provision of the state law for which it could find *any* other purpose in addition to communication of chemical hazards to employees. The consequences of this analysis are apparent from a brief review of the state and federal regulatory approaches.

The Pennsylvania Right-to-Know Act relies on the same essential elements as the federal Standard to communicate information about workplace chemical hazards. First, both federal and state law provide for determination of which chemicals are hazardous; next, manufacturers and employers generally are obligated to place identifying labels on containers of hazardous chemicals, and to obtain or prepare material safety data sheets ("MSDSs") containing a variety of data relevant to safe handling of the substance, while employers are also required to provide education and training to employees. The principal differences between the two regulatory systems are that: (1) under the Pennsylvania Right-to-Know Act, state authorities, rather than manufacturers and employers (guided by the Standard and the manda-

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[22] Recently, in *Ohio Manufacturers Ass'n v. City of Akron*, 801 F.2d 824 (6th Cir. 1986), the United States Court of Appeals for the Sixth Circuit applied these fundamental principles in holding an Ohio municipal "right-to-know" ordinance preempted by the Hazard Communication Standard to the same extent as legislation enacted by the states themselves.

tory hazard listings to which it refers),[23] determine which chemicals are hazardous, with all employers being required to file surveys on the hazardous chemicals in their workplaces;[24] (2) the Pennsylvania Right-to-Know Act requires workplace chemicals that could pose a hazard if released into the environment to be specially identified and reported in surveys;[25] and (3) the Pennsylvania Right-to-Know Act requires hazardous substance information to be provided on request to citizens and police, fire and emergency response agencies.[26] But even the comparable general requirements of the Pennsylvania statute and the federal Standard differ in their detailed provisions; in several instances, Pennsylvania mandates specific information on labels and MSDSs that the federal Standard does not.[27] Therefore, an MSDS or label

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[23] *See* 29 C.F.R. § 1910.1200(d)(3), (4); App. E-10.

[24] Pa. Stat. Ann. tit. 35, § 7303(a), (e); App. F-6 to 8.

[25] Pa. Stat. Ann. tit. 35, § 7303(d), (g); App. F-8 to 10.

[26] Pa. Stat. Ann. tit. 35, § 7303 (e), (f); App. F-8 to 9. The Pennsylvania statute is, unlike the federal Standard, also applicable to non-manufacturing employers. The petition for certiorari does not question the validity of the Right-to-Know Act with respect to non-manufacturing employers, although petitioners did raise this issue below.

[27] For example, Pennsylvania labels and MSDSs must include not only the identity of all hazardous ingredients constituting 1% or more of a mixture, as under the federal Standard, but also all ingredients constituting 3% or more of a mixture, for MSDSs, and 5% or more for labels, whether hazardous or not. Pa. Stat. Ann. tit. 35, §§ 7304(c)(2), 7306(a)(4); App. F-12, F-18 to 19. Full compositional labeling of this kind effectively eliminates the very foundation of OSHA's standard—that labels and MSDSs be used to communicate a warning based on a hazard assessment—and fails to direct the attention of employees, physicians and others to the chemicals which actually contribute to the hazards of the mixture. Thus, Pennsylvania's requirement is really a form of miscommunication that could lead to considerable confusion.

that would satisfy the federal Standard for a product sold generally in interstate commerce would not—without significant alterations—satisfy the Right-to-Know Act requirements when that same product is shipped into Pennsylvania.

In short, the Pennsylvania Right-to-Know Act is a statute largely concerning regulation of workplace hazard communication—duplicating and varying in specific details from the federal Standard—and interwoven with certain provisions purportedly aimed at community protection. In determining the extent to which the Pennsylvania statute would be preempted, the court of appeals gave maximum deference, not to Congress or OSHA, but to the state. It made no attempt to distinguish between those chemicals that could pose a danger if released into the environment and those chemicals whose dangers are confined to the workplace, as had the district court, *Manufacturers Association of Tri-County v. Knepper*, 623 F.Supp. 1066, 1072-73 (M.D. Pa. 1985); App. C-11 to 13, but upheld the listing and survey requirements for all hazardous chemicals, based on no more than the apparent breadth of the Pennsylvania list and the statutory duty to provide the survey information to non-employees if requested. *Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130, 137-38 (3d Cir. 1986); App. A-15 to 18. Nor, in assessing the state MSDS and labeling requirements, did it seek to distinguish between the manufacturing sector to which the OSHA standard applies and non-manufacturing employers, as had the district court, 623 F.Supp. at 1073-74; App. C-13 to 16. Instead, it upheld all of these requirements as well, offering merely the excuse that the information would be useful in completing the required surveys. It preempted only those few provisions of the Right-to-Know Act that could not be found to have any purpose whatsoever apart from employee hazard notification. 801 F.2d at 138-41; App. A-18 to 25.

The container labeling and MSDS requirements of the federal Standard are the heart of hazard communication regulation. Manufacturers and suppliers of chemicals go to considerable expense to provide to their purchasers the detailed information required. Here, the court of appeals has enabled each of the fifty states to require a separate label and MSDS for each of the thousands of hazardous chemicals shipped in interstate commerce. All that a state need do for such requirements to survive express preemption, under the court of appeals' test, is to mandate that copies of the labels and MSDSs be made available to state officials, curious citizens or the fire department. A state legislature will, of course, always be able to devise some public safety purpose for "right-to-know" laws. As a result, OSHA's Congressionally conferred responsibility to determine whether state regulation of hazard communication unduly burdens interstate commerce and is required by compelling local conditions will in practice be cancelled, since states will have considerably less reason to seek federal approval for their "right-to-know" regulations by participating in the state plan process. By upholding the Pennsylvania Right-to-Know Act where any conceivable state purpose apart from employee protection, however minimal, could be discerned, the court effectively nullified the preemption scheme of the OSH Act.

B. The Growing Number of State "Right-to-Know" Laws for Which OSHA Approval Has Not Been Obtained Demonstrates the Importance of This Issue

At the time OSHA promulgated the federal Hazard Communication Standard in 1983, the agency was already aware that multiple state regulation of hazardous chemicals in the workplace was a serious problem:

> Approximately twelve states and six local governments have some type of regulation related to the identification of hazardous substances. About thirteen other states and three other local governments have

> introduced proposed legislation either in this legislative session or in previous sessions. They cover different lists of substances, have different reporting requirements, serve different purposes, have different labeling and material safety data sheet requirements, and have different educational and training requirements.[28]

Since then, the problem has only worsened. At least thirty-three states have now adopted some form of "right-to-know" legislation or regulations with differing requirements or a broader scope than the federal Standard;[29] nineteen of these states have not obtained OSHA state plan approval for their regulation of private employers,[30] while OSHA has yet to approve or reject the statutes or regulations now in force in the remaining jurisdictions that are participating in the state plan process.[31] By comparison, ten states and territories with approved state plans have now adopted the OSHA Standard by reference or substantially identical regulations,[32]

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[28] 48 Fed. Reg. at 53,284.

[29] *See* Appendix.

[30] These states are Alabama, Connecticut, Delaware, Florida, Illinois, Louisiana, Maine, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, Texas, West Virginia, and Wisconsin. Oklahoma has right-to-know regulations applicable to public employers. A number of local governments in California, Connecticut, Florida, North Carolina, Ohio and Pennsylvania also have their own "right-to-know" ordinances.

[31] Alaska, California, Hawaii, Iowa, Maryland, Michigan, Minnesota, North Carolina, Oregon, Tennessee, Vermont, Washington and Wyoming are state-plan jurisdictions. 29 C.F.R. Part 1952 (1986). Their laws or regulations might be subject to preemption were they to be enforced subsequent to disapproval by OSHA. Connecticut and New York have only obtained state plan approval for public employees. 29 C.F.R. Part 1956, subparts E, F (1986).

[32] Arizona, Indiana, Kentucky, Nevada, New Mexico, Puerto Rico, South Carolina, Utah, Virginia, and the Virgin Islands. All

and a further ten jurisdictions have no hazard communication regulations of their own.[33]

Many of these state laws have their own specific tests for determining the hazardous chemicals regulated, not necessarily parallel to the federal Standard in their coverage, and require employers to identify hazardous chemicals in their workplaces according to lists issued by state agencies.[34] Several also impose specific container labeling requirements for substances shipped into the state, rather than merely requiring employers to preserve any existing labels.[35] Most require manufacturers to provide some form of MSDSs or equivalent data for hazardous substances shipped to purchasers in the state.[36] Finally, state "right-to-know" legislation typically contains some community protection provisions, ranging from elaborate procedures for emergency preparedness to, more commonly, a simple requirement that MSDSs and chemical surveys or lists for the workplace be made available to interested citizens or fire departments.[37]

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of these state-plan jurisdictions have now received OSHA approval of their regulations, except for Kentucky, on which OSHA has yet to act. 29 C.F.R. Part 1952.

[33] Arkansas, Colorado, District of Columbia, Georgia, Idaho, Kansas, Mississippi, Nebraska, Ohio (at the state level), and South Dakota.

[34] *See, e.g.*, Alabama, Florida, Illinois, Maine, New Hampshire, New Jersey, Pennsylvania, and West Virginia.

[35] *See, e.g.*, Massachusetts, New Jersey, and Pennsylvania.

[36] While some of these states expressly provide that MSDSs prepared in accordance with the federal Standard also satisfy state law, a substantial number do not, including, e.g., Alabama, Florida, New Hampshire, New York, Pennsylvania, and Vermont.

[37] Many states that are not participating in the state plan process have included such provisions in their workplace "right-to-know" statutes. *See, e.g.*, Alabama, Florida, Illinois, Maine, Massachusetts, Montana, New Hampshire, New Jersey, Pennsylvania, and Rhode Island. By comparison, some state plan states also have pure com-

Due to this proliferation of state laws, manufacturers and suppliers selling chemicals on a nationwide basis must familiarize themselves and attempt to comply with the complex regulatory schemes of a score of jurisdictions lacking any approved state plans. When the differences between hazard communication requirements are thus multiplied, compliance—with MSDS and labeling provisions in particular—becomes difficult if not impossible, and the safety of workers is put at risk by confusing variations. This additional and costly burden is needless. The Hazard Communication Standard already offers comprehensive protection in the manufacturing sector. It is not for the states to second-guess the wisdom or adequacy of Congress's and OSHA's approach—yet that is just what many states and local governments are seeking to do.

Thus, a decision by this Court will aid in resolving the validity, not merely of a single state's legislation, but of the entire field of "right-to-know" enactments nationwide. *Amici* do not contend that all existing state statutes in this area must be preempted. But because these statutes rely, in general, on the same regulatory approach and contain similar provisions, what this Court determines with respect to the Pennsylvania statute will be of immense value to the lower courts in assessing the extent to which the numerous other state laws are preempted as well. Already the Third Circuit's treatment of the Pennsylvania and New Jersey "right-to-know" statutes has led to confused results. In *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), the court of appeals found the substance survey requirements of the New Jersey Worker and Community

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munity "right-to-know" statutes, separate from their workplace regulations, that do not affect employees, *see, e.g.*, North Carolina, Vermont. Such laws, *amici* believe, present a less substantial preemption issue.

Right to Know Act,[38] which the district court here considered "substantially identical" to those of the Pennsylvania law, to be preempted.[39] The only apparent difference between the two statutes was of form rather than substance—the Pennsylvania law, as the district court put it, does not provide specifically for a "*workplace* hazardous substance list."[40] Should this Court defer action, such confusion, like the "right-to-know" statutes, will only multiply.

C. The Plain Language of the OSH Act and Decisions of this Court Demand a Broad Preemption Test to Counter the Proliferation of State Hazard Communication Regulation

Amici submit that the federal Hazard Communication Standard is intended to have a broad preemptive effect, based upon the statutory requirement in Section 18(b) that any state standards "relating to" the subject matter of a federal regulation are precluded. This Court has given a similar "relating to" preemption test in the ERISA statute[41] a broad construction, unanimously ruling that a state law "relates to" an employee benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), and recognizing, in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981), that the purposes of the state law need not be considered under such a "relating to" test in determining whether preemption is required. Here, the court of appeals turned this Court's understanding of the "relating to" test on its head. Instead of preempting any

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[38] N.J. Stat. Ann. §§ 34:5A-1 *et seq.* (West 1986).

[39] 623 F. Supp. at 1072; App. C-11.

[40] *Id.*

[41] Section 514(a), 29 U.S.C. § 1144(a) (1982). The Employee Retirement Income Security Act of 1974 is codified at 29 U.S.C. §§ 1001 *et seq.* (1982).

state requirements that have some connection to worker protection—as the container labeling and MSDS provisions clearly do—it refused to preempt them on the ground that they were connected to some state purpose in addition to worker protection.

Properly applied, a "relating to" test would surely preempt the most onerous of the state "right-to-know" requirements—those concerning separate container labeling and MSDSs, which are plainly destructive of uniform hazard communication regulation and extremely burdensome to manufacturers. States could still carry out their legitimate role in policing non-workplace hazards, but not in a manner that disrupts the uniformity of the federal scheme. Broad preemption of dual workplace-community statutes such as Pennsylvania's is necessary to ensure that the state legislature does not use non-workplace provisions as a mere front for its workplace regulation.

This Court, in the implied preemption context, has rightly recognized that deferring to the alleged purposes of the state legislatures would enable the states to "nullify nearly all unwanted federal legislation." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). Where Congress has mandated a broad test for express preemption, which focuses attention on the relationship of the state enactment to the federal rather than to the state purpose, the same result should obtain.[42] Congress has em-

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[42] *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), does not govern here owing to the significant difference between the statutory schemes at issue. In *Pacific Gas & Electric*, the Court found it appropriate to take state purposes into account where Congress had provided for a dual regulatory system, with federal authority over nuclear safety questions and continued state regulation of economic matters. The narrowness of federal preemption in that area was made evident in *Silkwood v. Kerr-McGee*, 464 U.S. 239 (1984), where this Court allowed a nuclear plant worker to maintain a tort action under state law for conduct related to radiation hazards. Here, by contrast, Congress has provided for uniform

powered OSHA to preempt state regulation here, and OSHA has exercised that authority; moreover, Congress has made OSHA the arbiter of whether state regulation may properly be substituted for the federal standard. In such circumstances there can be no "divided authority over interstate commerce." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981), *quoting Missouri Pacific Railroad Co. v. Stroud*, 267 U.S. 404, 408 (1925).

CONCLUSION

For the foregoing reasons, *amici* request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

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federal regulation of hazard communication, while giving states a specific opportunity to substitute their own regulation by obtaining OSHA approval.

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APPENDIX

APPENDIX

The following states (including both participants and non-participants in the state plan process) have enacted "right-to-know" legislation or adopted regulations with differing requirements or a broader scope than the federal standard.

Alabama. Ala. Code §§ 22-33-1 *et seq.* (1986).

Alaska. Alaska Stat. §§ 18.60.030, 18.60.065-.068, 18.60.105, 18.70.310, 29.35.500-.590 (1986); Alaska Admin. Code tit. 8, § 61.010 (Oct. 1985), incorporating § 15.0101, Hazard Communication Code (not printed in code).

California. Cal. Health & Safety Code §§ 25500 *et seq.* (West 1986) and Cal. Lab. Code §§ 6360 *et seq.* (West 1986); Cal. Admin. Code tit. 8, § 5194 (1985).

Connecticut. Conn. Gen. Stat. Ann. §§ 31-40a *et seq.* (West 1986).

Delaware. Del. Code Ann. tit. 16, §§ 2401 *et seq.* (1984).

Florida. Fla. Stat. Ann. §§ 442.101 *et seq.* (West 1986); Fla. Admin. Code Ann. §§ 38F-41.01 *et seq.* (Supp. 1985).

Hawaii. Hawaii Admin. Rules §§ 12-203-1 *et seq.* (effective June 16, 1984) (not codified).

Illinois. Ill. Ann. Stat. ch. 48, ¶¶ 1401 *et seq.* (Smith-Hurd 1986) and Ill. Ann. Stat. ch. 48, ¶¶ 2501 *et seq.* (Smith Hurd 1986); Ill. Admin. Code tit. 56, §§ 205.20 *et seq.* (1985).

Iowa. Iowa Code Ann. §§ 455D.1 *et seq.* (West 1986); Iowa Admin. Code §§ 347.110.1 *et seq.* (1986).

Louisiana. La. Rev. Stat. Ann. §§ 1150.61 *et seq.* (West 1986); Department of Public Safety and Correction Part V, Right to Know (May 20, 1986) (not printed in code).

Maine. Me. Rev. Stat. Ann. tit. 22, §§ 1696-A *et seq.* (1986) and tit. 26, §§ 1709 *et seq.* (1986); Rules Gov-

erning the Chemical Substance Identification Law (effective Sept. 10, 1985) (not codified).

Maryland. Md. Ann. Code art. 89, §§ 32A *et seq.* (1986) and Md. Health-Envtl. Code Ann. §§ 6-501 *et seq.* (1986); Md. Regs. Code tit. 9, §§ 12.33.01 *et seq.* (1986).

Massachusetts. Mass. Ann. Laws ch. 111F, §§ 1 *et seq.* (Law. Co-op. 1985); Mass. Regs. Code tit. 105, §§ 670.001 *et seq.* (1984) and tit. 441, §§ 21.01 *et seq.* (1984).

Michigan. Mich. Comp. Laws Ann. §§ 408.1005, .1011, .1014, .1031, .1063 (West 1986) (Mich. Stat. Ann. §§ 17.50(5), 17.50(11), 17.50(14), 17.50(31), 17.50(63) (Callaghan 1982 & Supp. 1986-87)).

Minnesota. Minn. Stat. Ann. §§ 145.94, 182.65 *et seq.* (West Supp. 1987); 4 Minn. R. §§ 5206.0100 *et seq.* (Supp. 1984).

Missouri. Mo. Ann. Stat. §§ 292.600 *et seq.* (Vernon 1987).

Montana. Mont. Code Ann. §§ 50-78-101 *et seq.* (1985).

New Hampshire. N.H. Rev. Stat. Ann. §§ 277-A:1 *et seq.* (1986); N.H. Code Admin. R. § He-P 1803.01 (1985).

New Jersey. N.J. Stat. Ann. §§ 34:5A-1 *et seq.* (West 1986); N.J. Admin. Code tit. 7, §§ 1G-1.1 *et seq.* (1984) and tit. 8, §§ 59-1.1 *et seq.* (1986). Certain provisions of the New Jersey statute have been preempted as a result of *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985).

New York. N.Y. Lab. Law §§ 875 *et seq.* (McKinney 1987); N.Y. Comp. Codes R. & Regs. tit. 10, §§ 72.1 *et seq.* (1982) and tit. 12, §§ 800.1 *et seq.* (1986).

North Carolina. N.C. Gen. Stat. §§ 95-173 *et seq.* (1986); N.C. Admin. Code tit. 13, § 7C.0101(a)(99) (Aug. 1986).

North Dakota. N.D. Cent. Code §§ 18-01-34 and 65-14-01 *et seq.* (1985).

Oklahoma. Oklahoma has adopted "right-to-know" regulations, pursuant to Okla. Stat. Ann. tit. 40, §§ 401 *et seq.* (West 1986), for public sector employers only. Okla. Reg. 86-212, Rules I-X (Apr. 15, 1986).

Oregon. Or. Rev. Stat. §§ 453.307 *et seq.* and §§ 654. 194.196 (1985); Or. Admin. R. §§ 437-155-001 *et seq.* (effective Nov. 25, 1985) (not printed in code).

Pennsylvania. Pa. Stat. Ann. tit. 35, §§ 7301 *et seq.* (Purdon Supp. 1986); 34 Pa. Code § 301.1 *et seq.* (1986). The Pennsylvania Department of Labor and Industry has proposed to revise its "right-to-know" regulations, 42 Pa. Bull. 4027 (Oct. 18, 1986), in light of the Third Circuit's decision.

Rhode Island. R.I. Gen. Laws §§ 28-21-1 *et seq.* (1986).

Tennessee. Tenn. Code Ann. §§ 50-3-2001 *et seq.* (1986); 4A Tenn. Comp. R. & Regs. ch. 0800-1-1, § .1200 (1986).

Texas. Tex. Rev. Civ. Stat. art. 5182b, §§ 1 *et seq.* (Vernon 1986); Tex. Admin. Code tit. 25, §§ 295.1 *et seq., reprinted in* 10 Tex. Reg. 4889 (1985) and 11 Tex. Reg. 850 (1986).

Vermont. Vt. Stat. Ann. tit. 18, §§ 1721 *et seq.* (1986); Vermont OSHA Part 1910 (amended Mar. 25, 1985) (not printed in code).

Washington. Wash. Rev. Code Ann. §§ 49.70.010 *et seq.* (West Supp. 1986-87); Wash. Admin. Code §§ 296-62-054 (Supp. 1984-85).

West Virginia. W. Va. Code §§ 16-31-1 *et seq.* (1986); and W. Va. Code §§ 21-3-18 *et seq.* (1985); Legis. R. 16-31, § 1 *et seq.* (effective July 10, 1985) and Admin. Reg. 21-3, § 1 (effective Aug. 24, 1983) (not codified).

Wisconsin. Wis. Stat. Ann. §§ 101.58 *et seq.* (West 1986); Wis. Admin. Code §§ ILHR 35 101.58 *et seq.* (Nov. 1986).

Wyoming. Wyo. G.R.R. § 27-11-105-Ch. XXI (not codified).